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Commercial Registration Appeal Tribunal



Ontario



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Summaries of Decisions

Volume 16 (1987)



Ontario

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 16
CITED 1987 16 C.R.A.T.

- * This volume contains in some instances full decisions and reasons given, and in others summaries only. If reference to the exact decision is desired, application should be made to the Registrar.

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THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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BERMUDA TAVERN LIMITED
(BERMUDA TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE (LOUNGE)

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES:

JOHN T. CLEMENT, Q.C. and CLIVE B. BYNOE, Q.C.,
representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 23 September 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Bermuda Tavern Limited, the holder of a lounge licence under the Liquor Licence Act, is appealing a three day suspension imposed by the Liquor Licence Board by its Decision dated June 16th, 1987. The Board found that the Licensee was in breach of the terms and conditions contained in Sections 8(5) and 8(6) of Ontario Regulation 581 and imposed the suspension "Both on the basis of specific and general deterrence..."

Although a hearing before this Tribunal is a hearing de novo, no witnesses were called. There was an Agreed Statement of Facts (Exhibit 7) filed, together with transcripts of part of the proceedings before the Justice of the Peace in the first instance and before a Provincial Judge in the appeal proceedings. In addition, the Tribunal has before it some of the exhibits which were filed with the Board and the Record of Proceedings before the Board which includes the Board's Decision.

Based on this material, the facts can be briefly outlined as follows:

The Bermuda Tavern Limited has been carrying on business in Toronto since 1960. As noted, it holds a lounge licence and is also licensed for adult entertainment by the

Metropolitan Toronto Licencing Commission. The entertainment provided is a 'nude revue' by female dancers. On two occasions, once in November 1985, and again in February 1986, minors were allowed on the premises and were served liquor.

The November 1985 incident is not in issue before this Tribunal as the Liquor Licence Board found no fault on the part of the Licensee in that instance. The February occurrence is another matter and was of particular concern to the Board.

On February 1st, 1986, the doorman for the Licensee, one John Estwick, permitted three underage youths to enter the premises. They were served liquor. As a result, charges were laid against the Licensee which were dismissed by the Justice of the Peace. The transcript of the evidence of John Estwick in that trial forms part of the record before this Tribunal. The decision of the Justice of the Peace was appealed by the Crown, but the appeal was dismissed.

In addition to the charges being laid before the Court, the Liquor Licence Board issued a Notice of Proposal to revoke the lounge licence. Following the hearing, the three day suspension was imposed.

There is no dispute that minors were allowed on the premises and were served liquor. The issue for this Tribunal to decide is whether the Licensee took all proper steps to insure that minors were not allowed on the premises and, if not, whether the suspension is the appropriate penalty for the breach of term and condition.

In reaching its decision, the Liquor Licence Board found Mr. Estwick was careless because he did not request a photo I.D. or an Age of Majority card, or a second piece of identification. In the Board's opinion, the lack of proper care on the part of the Licensee and its employees was further evidenced by the fact that a waitress served the minors without asking for an identification. In reading the Board's Decision, it appears to this Tribunal that the Board placed no little reliance on the fact that no photo I.D. was asked for. The Decision reads in part:

The defence contemplated by Section 8(6a) of the Regulations requires that a photo card be requested by the licensee. Indeed notwithstanding the signs posted by the licensee and indeed the licensee's policy, the doorman did not request a

photo or Age of Majority card (or even a second piece of identification).
(emphasis added)

In the Agreed Statement of Facts filed before this Tribunal and in argument, counsel for the Licensee stated that the identification cards produced by at least two of the youths contained a photo of the holder. This information was not in any way contradicted by counsel for the Board. The testimony of Mr. Estwick, as contained in the transcript, does not specifically address this matter. If a photo I.D. was in fact produced, the Decision of the Board shows that the members hearing the matter misapprehended part of the evidence in this regard.

As stated at the beginning of this decision, the hearing before the Tribunal is a hearing de novo. According to Mr. Estwick's evidence, again as contained in the transcript filed, he visually examined the youths and thought they looked very young. Having formed this opinion as to their age based on their physical appearance, he then questioned them for about three minutes and asked for proof of age. He stated that the youths did not seem nervous but seemed to know what they were doing. They produced I.D. cards (not any of those prescribed by the Regulations), at least two of which, according to the Statement of Facts, had their photographs on them. Mr. Estwick admitted that he had never seen the type of I.D. card produced before, but he said the youths told him, they were exchange students. Based on his questions and the I.D. cards produced, Mr. Estwick was convinced that the youths were not minors and he let them in.

In the Pioneer decision (1982) 6 LLAT, p. 57, the Tribunal stated:

By the very wording of the Regulation, it is apparent that an opinion must be formed by the person charged with that responsibility. It is the view of the Tribunal that the section was not meant to imply absolute liability in the event an error is made in the formation of that opinion, and further, the very words indicate that the Legislature for the Province of Ontario did not expect a licensee to be infallible. In other words, it is necessary that an opinion be formed and one must instead examine the

circumstances under which such an opinion is formed and the steps which a licensee took to prevent error, carelessness or recklessness in the formation of that opinion in admitting persons under the age of 19 years to the establishment.
(emphasis added)

In this case the Licensee has daily brought to the attention of its employees the penalties they face if they serve minors or drunks. There is a notice in the application for employment with the Licensee that employees serving minors will be fired without notice or pay. There are signs at the entrance of the premises that only persons over 19 years of age will be admitted. The signs specify that Age of Majority cards or other government issue identity cards with a photograph will be accepted. The waitress who served the minors without asking for identification, we are told, was dismissed.

Mr. Estwick did not know that the youths were under the age of 19 years. By stopping them and questioning them, he was not wilfully blind to the facts. Was he or the Licensee careless or reckless in carrying out the statutory duty imposed on them? On the little evidence before it, the Tribunal cannot reach the conclusion that the Licensee or his employee acted imprudently or did not exercise reasonable diligence. In view of this finding, no suspension is warranted on the basis of a breach of term or condition.

There is nothing in the evidence to support the reasonableness of a belief that the officers and directors will not carry on business in the future in accordance with law and with integrity and honesty.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 16th day of June, 1987.

CALIFORNIA'S MUSICAL ROADHOUSE INC.
(CALIFORNIA'S MUSICAL ROADHOUSE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE AND PATIO
LICENCE AND TO ATTACH A TERM AND CONDITION TO THE
LICENCES

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
BARBARA J. SHAND, Member
MARY SOLLAZZO, Member

APPEARANCES:

RICHARD I. KESTEN, representing the Applicant

MARK SKYPAS, representing the Liquor Licence Board

DATE OF

HEARING: 9 July 1986

Windsor

REASONS FOR DECISION AND ORDER

This is an appeal by California's Musical Roadhouse Inc., the Licensee of California's Musical Roadhouse Restaurant, from the Decision of the Liquor Licence Board of Ontario dated the 10th day of October, 1985, wherein the Board suspended the Dining Lounge Licence and Patio Licence of the Licensee for a period of ten days and, in addition, attached a term and condition requiring the sale and service of liquor to cease at 11:00 p.m. daily in the said premises.

The Liquor Licence Board issued a Notice of Proposal on the 6th day of June, 1985, whereby it proposed to suspend the said licences for a period of ten days and further requiring that the sale and service of liquor in the licensed premises shall cease at 10:00 p.m. daily on the grounds that the licence holder failed to maintain books and records that clearly and accurately set forth the purchases and the sales of food and liquor in the licensed premises and on the grounds that the gross receipts from the sale of food in the licensed premises was less than 40 per cent of the total receipts from the sale of food and liquor in the said premises contrary to the provisions of Section 8, subsections (35) and (36) and Section 9, subsection (5) of Regulation 581/80 of the Act. The Licensee requested a formal hearing

before the Board pursuant to the provisions of Section 11(3) of the Liquor Licence Act and a hearing was held on the 10th day of October, 1985, on which date the Board issued its Decision above referred to.

Counsel for the Applicant submitted some preliminary objections prior to any evidence being called. His first objection dealt with the fact that pursuant to Section 12(1) of the Liquor Licence Act, the Chairman of the Board is required to refer the application for a hearing to two or more members of the Board designated by the Chairman and, in this case, the hearing before the Liquor Licence Board was heard by the Chairman and one other member. Counsel submitted that Section 12(1) of the Liquor Licence Act had not been complied with. However, the Tribunal has previously ruled on this matter and has held that the Chairman of the Liquor Licence Board is a member within the meaning of the Act and is entitled to designate himself as one of the members of the Board designated for the purposes of the hearing and Decision. This objection was, therefore, denied.

Counsel for the Applicant submitted a second objection based on the fact that the other Board member hearing the appeal, E.M. Dunal, had prior to the hearing before the Liquor Licence Board on October 10th, 1985, discussed the merits of the Licensee's position with the Licensee and had reviewed the reports of the Liquor Licence Inspector. Counsel submitted that Mr. Dunal did not preside at the hearing on October 10th, 1985 with a clear, unbiased mind as he is required to do. The Tribunal pointed out, however, that the appeal from the Decision of the Liquor Licence Board is a hearing de novo and the objection was, therefore, denied.

At the beginning of the appeal, counsel for the Liquor Licence Board submitted a document as an exhibit called "Summary of Liquor/Food Sales for the period from December of 1984 to April of 1986", and this exhibit was admitted as Exhibit 6. Counsel for the Applicant objected to the admission of the document on the grounds that he had not had an opportunity to review the figures as set out and that in any event, the appeal was based upon the Decision taken by the Liquor Licence Board based on liquor sales from December of 1984 through to the end of February, 1985. The Tribunal admitted the Summary as evidence only with respect to the months of December, 1984, January 1985, and February, 1985. This information was already set forth in the Record of

Proceedings before the Liquor Licence Board filed as an exhibit in these proceedings and was a summary of the food/liquor sales reports filed by the Licensee with the Board.

The first witness called on behalf of the Liquor Licence Board was Leslie William Hebbard who was an Investigator with the Board for the past four and one-half years. The witness in his evidence referred to two reports which he had prepared for the Board as a result of visits to the licensed premises. The first report was dated April 24th, 1985 and was the report of a two-day monitor of the premises which was conducted by the witness commencing April 19th, 1985. The witness stated that this is a large establishment with a total permitted capacity of 671 persons as indicated by the Dining Lounge Licence. He stated that all tables in the establishment were small and that only four of the many tables were set up for dining with serviettes, silverware and placemats. He stated that all other tables were bare except for plastic tablecloths and ashtrays. The witness testified that there are two main cash registers in use, both being of the modern electronic type with identical programming and both located behind the bar in Dining Lounge number 2. He stated that the cash registers had 16 pre-programmed food keys which are not used at all as the programming does not match the current menu and that there was only one open food key and a manual tax key for use with food sales. The witness testified that there were 27 pre-programmed liquor keys, but that many of the item designations on the keys do not match the actual functions. The witness testified that the bar mix was rung up and recorded as food sales by using the unmarked cash register key. The sum of \$1.00 was recorded as food for each mixed drink sold. He stated that an examination of the sales journal indicated many errors and that Mr. Ken Boomer, one of the owners, had a hard time explaining these errors. The witness stated that it was difficult to understand where Mr. Boomer had gotten some of these figures as the errors found at various times were both more and less than the actual amounts found on the tapes. The witness stated that for the two-day monitor, the sales total for mix were \$494.00 and \$480.00, respectively, as against \$354.80 and \$368.15 for actual food sales. The witness stated that mix is a bar expense and that the cost of mix must be included as part of the liquor sales. The witness stated that he made a comparison of the figures submitted to the Board for the months of January and February 1985 with those found in the daily sales journal and his investigation indicated that the

food totals for both months had been altered. He stated that exactly the sum of \$3,000.00 had been added to the January total for food sales and that exactly the sum of \$1,000.00 had been added to the February total for food sales. The witness stated that he brought these discrepancies to the attention of Mr. Boomer who admitted that it was a case of "over enthusiastic reporting" of their food sales. The witness stated that as a result of the two-day monitor and the review of the figures for January and February, the actual liquor/food ratio for the licensed premises is approximately 90/10 and that these figures are readily borne out by the sales totals obtained during the two-day monitor. The figures indicated that liquor sales for Friday, April 19th, 1985 were \$3,093.91 (90 per cent) and that food sales for that date were \$354.80 (10 per cent). The liquor sales for Saturday, April 20th, 1985, were \$4,619.81 (92 1/2 per cent) and the food sales for that date were \$368.15 (7 1/2 per cent).

The witness also gave evidence with respect to his report of February 5th, 1985 arising out of a visit to the licensed premises on January 31st, 1985. The witness stated that he asked a waitress at approximately 10:05 p.m. if it was possible to get something to eat. He stated that he was supplied with a menu, but was advised that the kitchen closed at 10:00 p.m. and that no food was available after that time. The witness stated that this was contrary to Section 11(2) of Regulation 581/80 of the Liquor Licence Act. He stated that there were approximately 50 patrons present listening to a live rock band and that a young female patron was observed by him dancing alone in front of the band. In his opinion, this person was intoxicated and when she returned to her table, she was served a drink by a waitress. There was no evidence as to the type of beverage she was served. The witness stated that he returned to the licensed premises on Friday, February 1st, 1985 at 11:05 p.m. and that on this occasion, there were an estimated 300 to 400 patrons present. He stated that in his opinion, many of the persons were obviously minors and all appeared to be drinking and that there did not appear to be any checking of ages by the staff. He stated that no food was available. The witness stated that he again visited the premises on July 8th, 1986 and was provided with a menu when he requested it, but was advised that no food was available after 11:00 p.m. although the premises were open until 1:00 a.m. The witness stated that in his opinion, 80 per cent to 90 per cent of the total business was after 9:00 p.m. when the rock bands started to perform.

The witness testified that during the period of his two-day monitor of the premises in January of 1985, he was made aware of a special event which occurred on January 15th. This was the Hearn - Haggler fight which was shown on television and that the Dining Lounge number 3 was open on that evening. The witness stated that he made an examination of the books and records of that night and that there were no records at all for sales in the basement area where the fight was shown to customers. The witness testified that Ken Boomer had admitted to him that he had not entered the sales for the special event and had taken the records home. When requested, he produced the records which indicated liquor sales of \$3,742.00 and approximately \$20,000.00 in cover charges.

On cross-examination, the witness confirmed that the records for the special event of January 15th were produced when requested and that the event had occurred only four days before the monitor. He also confirmed that he had no knowledge of any charges having been laid with respect to the service of minors or intoxicated persons and that his observations were strictly his opinion. He also confirmed that since the premises were licensed for a dining lounge, the presence of minors was not illegal. The witness stated that it was his opinion that there was no effort made to sell food and that he had been advised that only one cook was on duty at lunch hour. He stated that he had no knowledge whether more cooks would be available. The witness stated that in his opinion, the books for the licensed premises were not adequate in that they were inaccurate and that the sales did not match the actual records. He stated that even if mix was allowed as food, this still would not result in the licensee being close to the required liquor/food ratio and that the addition of mix would only double the food sales to about 15 per cent to 20 per cent of total sales. When questioned about Mr. Boomer's statement of over enthusiastic reporting as an explanation for the increase by \$3,000.00 and \$1,000.00, respectively, for the food sales for the months of January and February, he stated that Mr. Boomer had explained that these amounts were added to cover the sale of pizza slices. He stated that the addition of the figures did not achieve anything but merely showed that the figures were not correct.

Counsel for the Licensee called as a witness Bradley Harris who was a Police Officer with the Windsor Police Force for the past 12 years and worked for the Licensee when he was off duty. The witness stated that he was in charge of security and was responsible to ensure that all regulations were met. He stated that he started working at the California's Musical Roadhouse Restaurant in January of 1986. He stated that all people who entered the premises were checked for identification and that there were several bouncers on duty. He had no knowledge of any charges being laid with respect to the service of minors or intoxicated persons and that, in his opinion, the bar was well run from a security point of view. The witness stated that to his knowledge food was always available, but he did not know whether it was promoted by the waitresses. The witness stated that his observations indicated that approximately 20 tables in the premises would be set for dining. On cross-examination, the witness stated that his hours of work were usually from 9:00 p.m. to 1:30 a.m. and that he was generally at the door and did not know whether the kitchen was open after 11:00 p.m.

The next witness called on behalf of the Licensee was Ted Boomer, the President of the Licensee corporation. He and Ken Boomer were the principals in the corporation. He stated that his duties were advertising and promotion and that Ken Boomer's responsibilities were security, bookkeeping and bartending. The witness stated that he was not aware of the January 1985 visit of Investigator Hebbard of the Liquor Licence Board. He stated that he submitted the liquor/food ratio reports each month to the Liquor Licence Board and that these figures were based on the daily sales from the cash register slips. He stated that he had no knowledge of any concern of the Windsor Police Department prior to January of 1985 and that no charges had ever been laid under the Liquor Licence Act. He stated that the police had monitored the premises on two occasions and found no under age persons drinking. He stated that the policy was to keep the kitchen open until 12:00 p.m. on weekdays and to 1:00 a.m. on Saturdays and that food was always available unless there were special situations. He stated that the waitress who told Mr. Hebbard that the kitchen was closed could have been lazy. The witness stated that in January of 1985, there would have been four to six people present on security every night and that the Licensees were concerned because they were close to what was known as a drug problem area in the City of Windsor. The witness stated that they have recently hired a food consultant and the attention of the Tribunal was drawn

to the various promotional activities carried on by the Licensee in an attempt to promote the sale of food. The witness stated that when he had been advised that the inclusion of mix as food was contrary to the liquor regulations, this practice had been stopped. He stated that there have been no complaints with respect to the premises since April of 1985 and that there have been no further inspections. The witness reviewed the copies of the various advertisements with respect to the activities carried on in the basement dining lounge. On cross-examination, the witness stated that the books and records of the Licensee are now prepared on an accurate basis and reflect all liquor and food sales.

The last witness called on behalf of the Licensee was Kenneth Boomer who was one of the principals of the Licensee. He stated that he had received an M.B.A. from the University of Windsor in 1980 as an Industrial Accountant. He stated that in reviewing the report of Investigator Hebbard dated April 24th, 1985, the sales records of the Licensee were in transition at that time and that Mrs. Ted Boomer had just taken over responsibility for the sales reports and payroll. When asked about the addition of the sum of \$3,000.00 and \$1,000.00, respectively, to the January and February food reports, he stated that the words "over enthusiastic reporting" were really words put into his mouth and that his was a statement of agreement. He stated that he had no recollection of any error in these amounts and that he could not recall any discussion that the amounts were included to cover pizza sales. The witness stated that the sales slips and reports for the special event of April 15th were taken home merely to do the work there since the report for April was only due on May 23rd and he has no knowledge why Mr. Hebbard stated that he never intended to report the liquor sales of \$3,740.82 from the Hearn's - Haggler fight. He stated that there was never an admission on his part of any intention not to report the sales. The witness stated that he was very unhappy with the Hebbard report and that too much attention had been focused on the \$1.75 liquor sale and 1.00 key sale re mix on the cash registers. The witness stated that there was no logic in cheating and changing the food reports to the extent of \$3,000.00 and \$1,000.00 as they could only improve the liquor/food ratio by up to three percent. He stated that they were attempting to do more dinner shows and that they were now running a very successful barbecue. The witness stated that it was almost impossible to meet a 60/40 food/liquor ratio because of the increase in liquor prices and he filed as an exhibit a document entitled

"The Injustice of the Ratio System" to illustrate the difficulties in meeting this ratio. The witness stated that the Licensee is one of the few establishments in Windsor providing entertainment which is not adult entertainment. He confirmed that there is a ratio problem, but that all sorts of ingenious ideas were being developed to help meet the proper ratio. On cross-examination, the witness stated that he did not have his books and records present today and was not aware of the present liquor/food ratio for the licensed premises. He stated that he knew it was a problem and estimated that in his opinion, the present ratio of food sales was between 20 per cent and 30 per cent of total food and liquor sales.

Counsel for the Board argued that the Licensee had failed to maintain books and records that clearly and accurately set forth the purchase and sale of food and liquor in the licensed premises and referred to the uncontradicted evidence of Investigator Hebbard with respect to the admission of the bar manager, Jan Knowles, that many liquor sales are recorded using the unmarked key. Counsel also referred to the direct evidence of the Investigator with respect to the numerous errors in recording the figures and the admission of "over enthusiastic reporting" of food sales resulting in a direct increase of \$3,000.00 and \$1,000.00, respectively, for the months of January and February, 1985. Counsel also referred to the evidence relating to the special event for the boxing match and the evidence that not all of the receipts for that evening were reported. Counsel for the Board referred to the results of the two-day monitor which indicated liquor sales for both days to be 90 per cent or higher of total sales and the failure of the Licensee to explain or justify their sales figures. It was apparent that the licence holders are not complying with the liquor/food ratio requirements of subsection 9(6) of the Regulation.

Counsel for the Licensee reviewed in detail the evidence of Investigator Hebbard and submitted to the Tribunal that there was no evidence of the service of minors or drunks and that all evidence with respect to these matters should be ignored. Counsel also submitted argument that there was no evidence to indicate that the Licensee had been dishonest in reporting to the Board. He acknowledged that there may have been some improper practices such as the charging of \$1.00 for mix as a food sale, but that as soon as they were aware that this practice was not proper, they discontinued the practice. Counsel also referred to the evidence as to the availability of food and the number of

ables which were set for dining as being the evidence of investigator Hebbard, alone, and that all of these allegations were denied by the Licensee. Counsel submitted that the evidence of Ken Boomer and Ted Boomer indicated that the Licensee is operating a well run establishment that is popular with the community. He acknowledged that there may be difficulty in meeting the liquor/food ratio, but that this does not justify the condemnation given it by the Liquor Licence Board as a result of its Decision of October 10th, 1985.

The Tribunal accepts the position of the Licensee that there is no evidence before it to indicate that the licensee was, in fact, selling liquor to drunks and minors, and the evidence of Inspector Hebbard is only his uncorroborated observations. However, the Tribunal does find that the licence holder has failed to maintain proper books and records that clearly and accurately set forth the purchases and sales of food and liquor in the licensed premises. Part of this can be attributed to poor record keeping in the early days of the Licensee's operations, but there is direct evidence of Kenneth Boomer to indicate an attempt by the Licensee to alter the food sales. There is also before the Tribunal the direct evidence of Investigator Hebbard that when he checked the actual records for the sales for January and February of 1985, the figures had been altered for both months in the amounts of \$3,000.00 and 1,000.00, respectively, and the explanation given to the Tribunal by the witness for the Licensee was completely inadequate. The business had been operating for nearly six months in April of 1985 when the two-day monitor was completed and no attempt had been made during that period to set up the cash registers in proper working order so as to properly record all sales of liquor and food. However, the Tribunal is impressed by the honest attempts of the Licensee to comply with the rules and regulations of the Board and the Tribunal is of the opinion that the period of licence suspension should be reduced from ten days to three days.

There is ample evidence before the Tribunal that the licensee is continuing to have ratio problems and on cross-examination, Kenneth Boomer acknowledged that in his opinion, the present ratio of food sales would be between 20 per cent and 30 per cent of total sales. The Licensee has not attempted to produce its own sales figures showing any improvement in the liquor/food ratio or establishing that the requirements of the Liquor Licence Act and Regulations have been met and the Tribunal must, therefore, accept the

evidence before it as confirming that the Licensee is in contravention of Section 9(6) of Regulation 581/80 of the Liquor Licence Act. The Tribunal, however, was impressed with the evidence filed as to the attempts of the Licensee to improve its liquor sales by various ingenious promotions. The Licensee has argued that the ratio system is unjust, but so long as the legislation is in force, the Tribunal has the responsibility of enforcing such legislation.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby varies the Decision of the Liquor Licence Board dated October 10th, 1985, as follows:

- a) The liquor licences of the Licensee are suspended for a period of three days and the Board is authorized to set the date of commencement of the said suspension;
- b) A term and condition is attached to the liquor licences whereby the sale and service of liquor shall cease at 12:00 o'clock midnight daily and such term and condition will continue in effect until such time as the Licensee is meeting the ratio to the satisfaction of the Board and application is made by the Licensee for the removal of same pursuant to Section 9(2) of the Liquor Licence Act.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Licensee. The appeal had not been concluded at the time of this publication.

EMPIRE SANDY INC.

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A LIQUOR LICENCE
TO REFUSE TO ISSUE SPECIAL OCCASION PERMITS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
BARBARA NICHOLS, Member
ROBERT COWAN, Member

APPEARANCES:

NORMAN F. ROGERS, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 19 March 1987 Toronto

REASONS FOR DECISION AND ORDER

By application dated February 10th, 1986, Empire Sandy Inc. applied to the Liquor Licence Board for a liquor licence for its charter vessel, the Empire Sandy. Several months later, after a hearing was held before the Board, the Board refused to issue either a liquor licence or Special Occasion Permits to the Corporation. The reasons cited for the refusal were twofold - firstly, that the vessel, the Empire Sandy, was not in possession of a valid Certificate from the Canadian Coast Guard, and secondly, that the past conduct of the officers or directors of the corporation afforded reasonable grounds for belief that the corporation's business will not be carried on in accordance with law. It is this decision which is being appealed to this Tribunal.

The evidence before the Tribunal is that the Empire Sandy was originally built as a deep sea salvage rescue ship. It was completely reconverted to a three masted sailing ship. It is described in its promotional material as follows:

AT 620 tons, 200 feet overall with 10,000 square feet of billowing sail the majestic EMPIRE SANDY is the largest sailing ship in Canada and the only passenger sailing ship that meets Canadian Coast Guard requirements for sailing the world's oceans. Other vessels are permitted to operate only on sheltered waters such as Toronto Harbour. Four spacious wood-panelled interior-lounges and wide expansive decks provide maximum comfort in any weather. GROUP RATES for a four hour cruise average \$25 per person including ship, dinner and bar service costs (based on 250 persons). LAST MINUTE CLUB For cruises booked LESS than 30 days in advance the Empire Sandy may be chartered exclusively for \$38 per person including dinner (minimum 55 persons).

There apparently was or is a difference of opinion with the Canadian Coast Guard as to the designation of this vessel since it has both sails and an auxiliary engine. A letter dated April 16th, 1986, included in Exhibit 3, states that the owners of the vessel were charged in 1985 with operating the vessel without a safety Inspection Certificate. A judge dismissed the charge on the grounds that the Empire Sandy was a sailing ship and was, therefore, exempt from the requirements to be inspected. The Coast Guard now takes the position that no safety Inspection Certificate can be issued to it because the Canadian Shipping Act does not apply to sailing vessels. It also refuses to make recommendations regarding the maximum number of passengers that may be safely carried or the minimum number of crew that should be carried. The Empire Sandy does comply with the Small Vessel Regulations and it also has a provisional load line Certificate for open sea issued by the Canadian Coast Guard.

The evidence on the past conduct of the officers of the Corporation was provided by Sgt. D. Tredrea of the Metropolitan Police Department. He referred to two incidents where breaches of the Liquor Licence Act occurred on the Empire Sandy. He was directly involved in the first, having attended a party on the ship in plainclothes and observed the sale of liquor to guests when there was no liquor licence or Special Occasion Permit. He was not present at the second incident

which took place a few weeks later when persons in an intoxicated state were seen leaving the vessel. Here he relied on the reports of other officers. The evidence as to the two incidents was not denied by Mr. Rogers who is the President of the Applicant Company but he did offer excuses for both. In the first instance, the plan of not selling liquor until after the vessel had left Canadian waters was thwarted by weather conditions. The question of whether or not it is legal to drink one's own liquor on a vessel which has living accommodations has not been conclusively decided. It was the contention of Mr. Rogers that that is what occurred during the second incident.

Called by the Applicant, Staff Inspector James Clark with the Morality Bureau in Toronto testified that aside from these two incidents, there was no record of any other infractions of the law in general or the Liquor Licence Act specifically connected with the Empire Sandy. Police Constable B. Johnson also testified that he was familiar with the Empire Sandy and that he had never observed any drunkenness or disorderly conduct on the part of passengers disembarking from the vessel.

Mr. Rogers also testified on behalf of his own Company. He said that the Coast Guard had never determined that the vessel is unsafe, that under the rules applicable to steamships, the Empire Sandy could carry up to 410 or 415 persons and that under stability tests, it could carry up to 270 persons. He also said that in order to comply fully with the requirements of the Canada Shipping Act as it applies to steamships, the Empire Sandy would have to be stripped of its interior wood panelling which would take away from its aesthetic value, would have to provide regulation life boats which would not be as safe as the equipment now provided and would have to provide guillotine type doors which again, in his opinion, would lessen the safety rather than enhance it on this particular vessel. In his opinion, the vessel is a safe vessel as it now stands and should be granted a liquor licence.

The Liquor Licence Act is not very helpful insofar as this particular vessel is concerned. To begin with, this Tribunal has serious doubts that the Empire Sandy is a "ship" as defined in Section 1(p) of Ontario Regulation 581 under the Act. As there defined, a "'ship' means a vessel...which conveys passengers on a regular schedule on a set route and that has dining facilities adequate to serve its passengers." On the evidence before it, this Tribunal cannot find that the Empire Sandy has a regular schedule or a set route. It appears

to the Tribunal that the Empire Sandy only operates when it has a charter and it goes where the charterer directs, subject to the Master's right to disobey directions if the safety of the vessel is in issue. However, the Liquor Licence Board has taken the position, notwithstanding its own Regulations, that the Empire Sandy is a ship for purposes of the Act. On this basis and for purposes of this Decision, the Tribunal accepts it as such as well. Section 5 of the Regulation sets out the type of licences available to ships. Section 8(16) of the Regulation provides that the "stated capacity" of the license premises should not be exceeded, but provides no direction of how capacity is to be determined on a ship, unlike the situation with respect to buildings which set out the criteria in Section 13(1) of the Regulation.

Section 9(8) of the Regulation provides that liquor may be sold only when the ship is in transit or "on a trip the main purpose of which is the transportation of its passengers..." Neither the Act nor the Regulations require a official safety Inspection Certificate or any other safety Certificate for that matter as a precondition for issuing a liquor licence. This is to be contrasted with the provisions related to aircraft which are clearly spelled out in the Regulations.

Under the Act, Section 6(1)(f), an Applicant is entitled to a liquor licence unless, "the premises and accommodation, equipment and facilities in respect of which the licence is issued do not comply with the provisions of this Act and the regulations applicable thereto." Mr. Grannum, counsel for the Board, could not direct this Tribunal to any provision in the Act or Regulations which would disentitle the Empire Sandy Inc. from a licence under this clause.

It is unclear whether a vessel with sleeping and eating facilities is a dwelling place and is a residence as defined in Section 45(1)(b) of the Act. Until this matter is either determined by the Courts or the Act is amended to clarify the situation, the legality of persons bringing their own liquor on board a chartered vessel and consuming it there remains in question. Until this issue is resolved, a charter boat operator should not be penalized for allowing liquor to be brought on board and to be consumed by guests of the charterer.

The Tribunal is concerned, however, with the fact that an officer of the Applicant, namely Mr. Rogers, allowed liquor to be brought on board the Empire Sandy knowing that it would

be offered for sale and knowing that there was no Special Occasion Permit issued for that particular cruise. Mr. Rogers said that instructions were given to the staff not to sell liquor until the vessel was in U.S.A. waters. Apparently a heavy fog prevented the Empire Sandy from reaching these waters as quickly as expected and, in fact, and contrary to instructions, liquor was sold without a permit in Canadian waters contrary to the Liquor Licence Act. This is the only contravention of the Act or Regulations proven to the satisfaction of the Tribunal.

The issue for the Tribunal is to decide whether this infraction alone is sufficient to disentitle the Applicant from a liquor licence under Section 6(1)(c)(ii). In the Tribunal's opinion, it is not. We do not think that the Board has discharged the onus on it to prove to the satisfaction of this Tribunal that there are reasonable grounds for belief that the business will not be carried on in accordance with law, and with integrity and honesty.

The Tribunal has had the opportunity of hearing Mr. Rogers express his views on the operation of his vessel and, in particular, on the need to regulate the sale of liquor to passengers on board ship and to control the amount of liquor being consumed. He appears to the Tribunal to be a responsible person in this regard. With the grey area of the liquor licence law respecting consumption of liquor on chartered boats, the Tribunal is of the opinion that it would be in the public interest to issue the licences requested under the Act rather than to allow the boat to continue operating on the basis it has in the past. Nevertheless, we are also of the opinion that the Liquor Licence Board should have some assurances that the vessel, the Empire Sandy, is seaworthy and that it is capable of safely carrying the maximum number of passengers proposed. Under the present Act and Regulations, such assurances need not be from the Canadian Coast Guard. A written opinion to this effect from an accredited, industry recognized, qualified marine surveyor should suffice for this purpose.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 15th day of December, 1986, and directs the Board to issue the liquor licence and Special Occasion Permits, subject to the above terms and conditions.

533279 ONTARIO INC.
(RIPPLES STEAK HOUSE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
NEIL VOSBURGH, Member

APPEARANCES:

RAY HASSAN-ASSAF, Agent for the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 29 October 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 533279 Ontario Inc., Licensee of Ripples Steak House Restaurant, situate at 1203-1205 Dundas Street, London, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 7th day of August, 1986, revoking the Dining Lounge Licence of the Licensee for the said premises on the grounds that the Licensee cannot reasonably be expected to be financially responsible in the conduct of its business, specifically for nonpayment of retail sales tax to the Minister of Revenue for the Province of Ontario in the amount of \$11,938.62.

The Board originally issued a Notice of Proposal on the 19th day of March, 1986, and as a result of that Notice of Proposal the Licensee requested a hearing before the Board. This hearing was held on the 7th day of August, 1986 and the Board, on that date, ordered the revocation of the said liquor licence effective August 30th, 1986.

Counsel for the Liquor Licence Board called as a witness Mervyn Moscrop, the Supervisor of Collections for the Retail Sales Tax Branch of the Ministry of Revenue, who is responsible for the collection of arrears of retail sales tax from licensees under the Liquor Licence Act. The witness advised that he was familiar with the Licensee. The witness

gave evidence that an application for a retail sales tax licence was made on January 18th, 1984, and he gave evidence that the Licensee had not filed its sales tax return for the month of December, 1985. He stated that the total liability for arrears of retail sales tax for the period to December 31st, 1985 was \$14,994.37 as of July 31st, 1986, including penalties and interest to that date. The witness confirmed that subsequent to December 31st, 1985, retail sales tax returns had been filed for the various months in 1986 and payments of tax made in accordance with the amounts due under the returns, but no attempt had been made to pay the arrears. The witness confirmed that the outstanding balance owing to October 28th, 1986 including interest was \$15,288.49 and that this balance remains unpaid.

The only witness called on behalf of the Licensee was Ray Hassan-Assaf who stated that he represented Mustapha Hassan-Assaf, the landlord of the premises. He stated that the landlord had called in the bailiff to liquidate the assets of the restaurant to gain back rent and that he took possession of the business. The witness stated that an application for the transfer of the liquor licence had been made in March of 1986 and that a new retail sales tax permit had been issued by the London office of the Retail Sales Tax Branch to Mustapha Ali Hassan-Assaf operating the said business under the trade name of "Larry's Diner". The witness stated that all retail sales tax for the premises had been paid from and including March of 1986. He stated that an application had been made for transfer of the liquor licence to Mustapha Hassan-Assaf as a landlord in possession and the witness produced a letter from the Liquor Licence Board of Ontario dated March 12th, 1986, approving the transfer. This letter states that the transfer will only be effective upon receipt of a retail sales tax clearance for the current Licensee of record's operation.

On cross-examination, the witness confirmed that he has continued to operate the restaurant and dining lounge and stated that a full transfer of the licence had not come through. He also admitted on cross-examination that there had been no application made for the renewal of the liquor licence which expired on August 31st, 1986. The witness stated that he was not involved with the Licensee, 533279 Ontario Inc., and that the principals had been his brother Larry Hassan-Assaf and Dan Clancy who had operated the premises under the name of "Ripples Steak House Restaurant".

Counsel for the Board recalled Mr. Mervyn Moscrop who testified that a vendor's permit would be issued by the Retail Sales Tax Branch of the Ministry of Revenue to anybody who applies for a permit and that in this case, the application by Mustapha Ali Hassan-Assaf was made for an entirely different entity, namely "Larry's Diner", and that this would have nothing to do with the arrears owing by the Licensee.

In argument, counsel for the Board stated that there was unchallenged evidence before the Tribunal that there was presently owing the sum of \$15,288.49 by the Licensee, 533279 Ontario Inc., with respect to the operation of the Dining Lounge Licence under the name of "Ripples Steak House Restaurant". It was pointed out to the Tribunal that Larry Hassan-Assaf, the former President, still was involved since he had written the letter dated May 12th, 1986, requesting the hearing before the Liquor Licence Board in response to the Notice of Proposal, although the licence had been conditionally transferred on March 12th, 1986.

In argument, Mr. Hassan-Assaf submitted that after the bailiff had been called in to repossess the premises on behalf of the landlord a new retail sales licence was requested, but that they could not get any concrete action from the Retail Sales Tax Branch. He stated that his solicitor had been instructed to discuss the possibility of settlement with the Retail Sales Tax Branch in October of 1986. Mr. Hassan-Assaf referred to Section 20 of The Retail Sales Tax Act which limits the liability of any person who takes control of the property of a vendor to a maximum of one year, but he argued that this should not apply to a landlord in possession.

The Tribunal finds upon the evidence that the Licensee, 533279 Ontario Inc., is in arrears of retail sales tax in the amount of \$15,288.49 as of the 28th day of October, 1986. The Applicant has raised various issues including the fact that the liquor licence was transferred to Mustapha Hassan-Assaf as a landlord in possession and that as such the transferee is not responsible for payment of the arrears of retail sales tax. However, the letter of March 12th, 1986, from the Liquor Licence Board of Ontario approving the transfer made it contingent upon receipt of a retail sales tax clearance of the current Licensee of record's operation, and no such clearance has been issued since the arrears of tax have not been paid. The Applicant filed evidence of an application for a new vendor's permit,

ut this has nothing to do with compliance with the requirement of a retail sales tax clearance of the operations of 533279 Ontario Inc. In addition, there is evidence before the Tribunal that the Dining Lounge Licence for these premises expired on August 31st, 1986, and that there had been no application for a renewal of the licence. There is a question as to whether there is any licence still in effect but, since this appeal was launched prior to the expiry of the licence, the Tribunal has considered the appeal on its merits.

The Tribunal finds that having regard to its financial position and the fact that substantial arrears of retail sales tax remain unpaid, the Licensee cannot reasonably be expected to be financially responsible in the conduct of its business. Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal confirms the Decision of the Liquor Licence Board of Ontario dated the 7th day of August, 1986, revoking the Dining Lounge Licence issued to 533279 Ontario Inc. in respect of the premises known as "Ripples Steak House Restaurant", 1203-1205 Dundas Street, in the City of London, in the Province of Ontario, and directs the Board to set the date on which the said revocation shall be effective.

521076 ONTARIO INC.
(ALGODEN HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCES (DINING LOUNGE AND LOUNGE) forthwith until all of the outstanding Retail Sales Tax arrears, including interest and penalties, are paid. In the event the said arrears and interest and penalties are not paid on or before January 10th, 1987, the licence shall be revoked.

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

WILLIAM C. BROWN, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 23 July 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 521076 Ontario Inc., Licensee of the Algoden Hotel in Elliot Lake from the Decision of the Liquor Licence Board on the 15th day of December, 1986, resulting from a hearing held in Sudbury on November 25th, 1986.

The Board members having reserved their decision have now ordered the suspension of the licence and further ordered that it remain suspended until all Retail Sales Tax arrears are paid and in the event the arrears were not retired before January 10th, 1987, the licence was to be revoked.

The Board hearing and the suspension arose from the following circumstances: In August of 1985 the hotel was purchased by 521076 Ontario Inc. for a purchase price of \$250,000.00. It is a 39 room hotel situate in Elliot Lake, containing a licensed premise on the ground floor, the subject of a dining lounge licence and a bar beverage room on the lower floor. The Company carried on extensive renovations to the premises which were financed through a

first mortgage in favour of the Federal Development Bank in the amount of \$400,000.00 which was also secured against other assets of the purchasers. The shareholders and directors of the Company, 521076 Ontario Inc. were Dougald and Robert MacRae.

Not wishing, however, to operate the restaurant and bars in the hotel, the MacRaes entered into a lease with a group which had been operating a restaurant in Elliot Lake by the name of Dante's Restaurant. On July 9th, 1985, the group applied for incorporation of a company known as Brotrio Group Inc. for the purposes of operating the leased premises. The directors of this Company were Timothy Mark Stortini, Stephen Kenneth Sportan, and Dougald and Robert MacRae. Some months later about April of 1986, the MacRaes learned that the company, Brotrio Group Inc., was not meeting its financial obligations and that the Retail Sales Tax particularly was in arrears. It appears that the payroll was also in arrears in the amount of approximately \$15,000.00. The MacRaes and Stortini then signed for a loan from the Toronto-Dominion Bank in Elliot Lake in the amount of \$30,000.00 which apparently was intended to retire the obligations to the Retail Sales Tax Department. The bank, however, applied the amount of the loan to an overdraft with the bank as a result of which the Retail Sales Tax Department received no funds. The Brotrio Group Inc. was also in arrears in its rent payable to the Applicant in the amount of some \$24,000.00 and on the 24th day of June, 1986, 521076 Ontario Inc., as landlord, took over possession of the premises.

Since the Brotrio Group Inc. had been operating under a liquor licence granted to that Company, application was made to the Liquor Licence Board for a transfer to 521076 Ontario Inc. now the landlord in possession and this was approved by the Board on July 8th, 1986. The hotel was then being operated by the Applicant and the MacRaes, the Brotrio Group Inc. having made an assignment in bankruptcy.

Payments were made by the Applicant to the Retail Sales Tax Department under its new licence but there appeared to be some confusion with regard to the Retail Sales Tax number and all remittances were credited to the former Brotrio Group's account until the Applicant company obtained a new number. It was alleged by the Applicant that the Retail Sales Tax Department gave some assurance that the remittances by that Company would be transferred to the current taxes instead of the tax arrears owing by the Brotrio Group Inc.

On or about the 14th day of November, 1986, an Agreement of Purchase and Sale was entered into by 521076 Ontario Inc. with one Barry Hildebrandt who was purchasing the premises in trust for a Company to be incorporated. The Agreement called for a total payment of \$440,000.00 and was conditional upon the transfer of the Applicant's liquor licence to the prospective purchasers. Objection to the transfer, however, was filed by the Retail Sales Tax Department until all the arrears owed to it by the Brotrio Group Inc. were retired. Thus ensued the suspension and revocation which is the subject of this appeal.

The Chairman of the Liquor Licence Board in his written Decision of the 5th of December, 1986, pointed out that the MacRaes were Directors of both Companies, the Brotrio Group Inc. and 521076 Ontario Inc. That is not denied. Mr. Brown, however, counsel for the Applicant, has filed a letter dated July 16th, 1987, from Mr. George W. Priddle, Q.C., counsel for both Companies which sets out the involvement of the MacRaes in the Brotrio Group Inc. He points out that although 521076 Ontario Inc. was a shareholder and the MacRaes were Directors of Brotrio Group Inc., the MacRaes were only to have a minor role in the Company and not to be involved in its operation. The intent obviously of the MacRaes investment in that Company was simply to protect that investment but the operation of the bar and restaurant was not within their province. It is also clear from the evidence that the MacRaes knew nothing about the financial condition of the Company until approximately April of 1986. The Tribunal is aware that the Liquor Licence Board in its deliberations considered that Section 6(c)(iii) of the Liquor Licence Act was applicable to the circumstances and that under Section 19(1) the MacRaes held equity shares in both Companies. There is, however, nothing in the evidence to point to the MacRaes being involved in the Brotrio Group Inc. in anything more than a nominal role and we cannot find that Section 6(c)(iii) is applicable in that there is no evidence the Applicant Company or the MacRaes will not carry on business in accordance with law, integrity and honesty.

The Tribunal has further considered the application of Section 8(40) of the Regulations under the Liquor Licence Act which provides:

It is a term and condition of a licence that is issued for the first time or a renewal thereof that the holder of the

licence hold a valid Vendor's Permit issued under the Retail Sales Tax Act and that the holder of the licence owe no moneys under that Act.

On a strict interpretation of subsection 40, it is clear, subject to Section 19 of the Act, that the Applicant company is not indebted to the Retail Sales Tax Department in any sum.

It is also clear from the evidence that the only objection now to the transfer of the Applicant's licence to the proposed purchaser is the objection of the Retail Sales Tax Department. Mr. Grannum, counsel for the Liquor Licence Board, observed that the Board had no objection to the transfer. We are, therefore, of the opinion that the objection of the Retail Sales Tax Department to the transfer of this licence is clearly not sufficient to withhold from the Applicant the right to transfer the licence to the prospective purchaser. It would appear to be in the interest of all parties concerned that the licence be transferred and the Retail Sales Tax Department take whatever measures are available to it to collect the arrears from the parties responsible.

By virtue of the authority vested in it under Section 4(3) of the Liquor Licence Act, the Tribunal hereby directs:

) that the licence suspended under the Order of the Chairman of the Liquor Licence Board on the 15th day of December, 1986, be reinstated, if in fact it has been suspended on the condition that immediate transfer of this licence be made to 57509 Ontario Inc. on the closing of the transaction, and on the further condition;

) that 657509 Ontario Inc. has no officers, directors or shareholders who were formerly or presently officers, directors and shareholders of 521076 Ontario Inc. or Brotrio Inc.

FLORENCE LEWIS SPORTS WEAR LIMITED

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING LOUNGE LICENCE

RE: 1950'S ICE CREAM AND BURGER PARLOUR INC.

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
DR. STUART E. ROSENBERG, Member
ROBERT COWAN, Member

APPEARANCES:

PATRICIA MURRAY, representing the 1950'S Ice Cream
and Burger Parlour Inc.

S.A. GRANNUM, representing the Liquor Licence Board

No one appearing for Florence Lewis
Sports Wear Limited

DATE OF
HEARING 25 June 1987

Toronto

REASONS FOR DECISION AND ORDER

The hearing of this appeal was to commence at 9:30 a.m. on June 25th, 1987. After waiting thirty minutes, the Tribunal commenced the hearing. The Registrar for the Tribunal filed as Exhibit 2, the Appointment For and Notice of Hearing addressed to Tony Lewis, Florence Lewis Sports Wear Limited.

No one appeared for the Applicant and no one at the hearing opposed the Decision of the Liquor Licence Board in this matter dated April 14th, 1987.

The Tribunal having been satisfied that the Applicant had been properly served with the Appointment For and Notice of Hearing which states in part:

...a hearing by the Commercial
Registration Appeal Tribunal will be held
in the Tribunal's chambers, 10th floor, 1
St. Clair Avenue West, Toronto on
Thursday, the 25th day of June, 1987, at
9:30 o'clock in the forenoon...

and further that

...If you do not attend at the hearing,
the Commercial Registration Appeal
Tribunal may proceed in your absence and
you will not be entitled to any further
notice in the proceedings.

dismisses the appeal of the Applicant and by virtue of the
authority vested in it under Section 14(3) of the Liquor
Licence Act confirms the Decision of the Liquor Licence Board
dated the 14th day of April, 1987.

495479 ONTARIO LIMITED
(ACADIAN TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
DENNIS J. EGAN, Member

APPEARANCES:

PAULINE R. SHEPS, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 4 December 1987

Toronto

REASONS FOR DECISION AND ORDER

Counsel for the Liquor Licence Board and for the Licensee have jointly requested the Tribunal to reduce the period of suspension imposed by the Decision under appeal. Counsel have cited as reasons justifying the reduced suspension the following facts:

1. The violations set forth in the Proposal, with one exception, occurred in 1985 and 1986.
2. The sole violation in 1987 occurred in part of the basement premises which had been rented out for the evening. The Licensee is no longer renting out any part of the premises.
3. The principals of the Licensee were new and inexperienced operators in 1985.
4. Many of the problems have been resolved as the result of changes in the make-up of the Licensee's staff.
5. The financial consequences of a 28 day suspension would be disastrous to the Licensee.

6. The Licensee was unrepresented at the Board hearing.

Under these circumstances, and by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby varies the Decision of the Liquor Licence Board dated the 1st day of September, 1987 and orders that the licence issued to 495479 Ontario Limited in respect of the Acadian Tavern be suspended for a period of fourteen days commencing January 4th, 1988 to January 17th, 1988, inclusive.

NINA GIORTZINIS
(QUINTA RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO IMMEDIATELY SUSPEND THE DINING LOUNGE LICENCE
AND TO REVOKE THE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

LAWRENCE C. DUCAS, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 4, 11 February 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Nina Giortzinis, the Licensee of the Quinta Restaurant at 484 Danforth Avenue, Toronto, Ontario firstly from the Decision of the Liquor Licence Board of Ontario dated the 17th day of June, 1986, suspending the dining lounge licence of the Licensee for a period of fourteen days and secondly, from the Order of the Liquor Licence Board dated the 18th day of December, 1986, to immediately suspend and thereafter to revoke the dining lounge licence of the Licensee.

The Liquor Licence Board issued a Notice of Proposal on the 25th day of March, 1986 to suspend the said licence pursuant to Section 10(3) of the Liquor Licence Act on the grounds that the Licensee permitted liquor other than that sold under the authority of a licence to be brought upon the licensed premises, that the Licensee failed to ensure that no more persons than the stated capacity on the licence were present in the licensed premises at any one time and that the Licensee failed to remove evidence of the service and consumption of liquor within 45 minutes after the sale and service of liquor ought to have ceased in the licensed premises. The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 17th day of June, 1986. The Liquor Licence Board in its Decision suspended the dining lounge licence of the Licensee for a period of fourteen days. The Licensee appealed that Decision to this Tribunal.

In separate proceedings against the Licensee, the Liquor Licence Board issued a Notice of Proposal dated the 18th day of December, 1986, whereby it proposed pursuant to Section 10(3) of the Liquor Licence Act to suspend immediately and thereafter to revoke the dining lounge licence of the Licensee because, according to the Proposal, the past conduct of the licence holder affords reasonable grounds for belief that she will not carry on business in accordance with law and honesty or, alternatively, she is carrying on activities that are contrary to the regulations of the Act. Counsel for the Licensee brought an application pursuant to Section 14(2) of the Act to request a hearing before the Tribunal, granting a stay of the interim Order of Suspension and requesting an adjournment of the proceedings before the Tribunal. By Order dated the 22nd day of December, 1986, the Tribunal adjourned the proceedings sine die and granted a stay of the interim Order of Suspension.

At the opening of these proceedings, counsel for the Applicant requested that as there were two separate appeals, they should be heard and dealt with separately. He also requested an adjournment of these proceedings on the grounds that an application for the transfer of the dining lounge licence had been submitted to the Liquor Licence Board and that if the application for transfer is approved, these proceedings would be academic. Counsel stated that the application for transfer was complete with the exception of payment of arrears of sales tax and the issuance of a new sales tax number to the Licensee. The Applicant, therefore, asked that the Tribunal either firstly consider the application for the transfer of the licence or, in the alternative, refer the matter of the transfer of licence back to the Liquor Licence Board to be considered before these appeals are dealt with. Counsel for the Liquor Licence Board argued that the Tribunal had no jurisdiction to consider the transfer since there had been no hearing or decision with respect to the transfer by the Liquor Licence Board and, therefore, there had been no proceedings by way of appeal pursuant to Section 14 of the Liquor Licence Act. Counsel submitted that the Tribunal can only consider a transfer on an appeal from the Board's Decision. Counsel also pointed out that the original Order of Suspension issued by the Liquor Licence Board was in June of 1986 and the application for the transfer of the licence was only made in January of 1987 and that there was an obligation to deal with the conduct of a Licensee before an application for transfer would be considered. After reviewing the submissions made, the Tribunal refused the request for an adjournment and directed that these proceedings should continue.

The first witness called on behalf of the Liquor Licence Board was Police Constable Franz Vanden Bijllaardt who was with the Morality Branch of the Metropolitan Toronto Police Department. The witness stated that he knew the Quinta Restaurant which is located on the second floor of a building at the northeast corner of Danforth Avenue and Logan Avenue in the City of Toronto. He stated that according to the liquor licence for the premises, the dining lounge has a permitted capacity for 81 persons and that the bar is located along the east wall of the dining lounge. The witness stated that he attended at the licensed premises at approximately 2:45 a.m. in the early morning of September 21st, 1985 in plain clothes. He advised that his duties included the responsibility for premises licensed under the Liquor Licence Act. The witness stated that he was met at the top of the stairs by Bill Giortzinis, the husband of the Licensee. He stated that he noticed between 40 and 50 people sitting around approximately dozen tables with coffee cups in front of them. The witness stated that he was accompanied by Police Constable Green of the Metropolitan Toronto Police Force and that he proceeded to the bar area and picked up two separate cups in front of customers. He stated that one cup contained ouzo and the second cup contained whiskey. The witness stated that he seized the contents of the cups, sealed the contents and sent them to the Liquor Licence Board for analysis. He stated that there were some liquor bottles on the bar which still had their pouring spouts. The witness stated that Nina Giortzinis, the Licensee, was not present at this time.

The witness stated that on September 26th, 1985 at approximately 2:05 a.m., he again attended at the premises and at this time, twelve persons were sitting at five separate tables in the dining lounge area and that some of these persons had wine glasses in front of them. He observed a patron drinking from a glass and upon smelling it, he stated that it was strongly alcoholic. The witness stated that a waitress was gathering up glasses and taking them to the washroom. He questioned Bill Giortzinis as to the contents of the glasses and was advised that they were rum and coke. The witness stated that the drinks were seized and sent to the Liquor Licence Board for analysis. He stated that charges were laid for failure to remove signs of the sale and service of liquor in accordance with the regulations of the Liquor Licence Act, but the witness had no knowledge of any convictions with respect to the said charges.

On cross-examination, the witness advised that he had attended at the Quinta Restaurant on the instructions of his

supervisor because of a complaint of after-hours services. He stated that he identified himself as a police officer to Bill Giortzinis who stated that he was the manager of the premises and that his wife Nina Giortzinis was the owner of the premises. The witness stated that Tom Sirilas was also present and that he identified himself as a partner of Mrs. Giortzinis. The witness acknowledged that he did not see any beverages being served when he was on the premises, but that he only saw them in the cups and glasses on the tables and that he did not personally sample the contents.

The next witness called on behalf of the Board was Police Constable Lawrence Green of the Metropolitan Toronto Police Department who stated that he attended at the premises with Police Constable Vanden Bijllaardt on September 21st, 1985 and confirmed that the officers arrived at approximately 2:45 a.m. The witness stated that he observed beer in clear and coloured glasses and liquor in coffee cups which were seized and forwarded for analysis. The witness stated that Tom Sirilas was present at the time and Sirilas denied that there was liquor in the cups. The witness stated that he smelled the contents of the glasses and cups, and that it was quite obvious to him that the cups and glasses contained liquor. The witness stated that he also attended at the premises at approximately 2:05 a.m. on the early morning of September 26th, 1985, and again seized the contents of certain cups which appeared to be liquor in the possession of various patrons on the premises and forwarded the liquid for analysis. The witness stated that he only met Nina Giortzinis once on a later occasion and at that time advised her of the charges laid for failure to remove signs of service and permitting the consumption of liquor after hours. The witness stated that Bill Giortzinis and Tom Sirilas were both charged with these offences under the Liquor Licence Act and the witness was present in court when both parties pleaded guilty to the said charges.

On cross-examination, the witness stated that he was known to both Tom Sirilas and Bill Giortzinis as a police officer, but that he had identified himself on the first occasion. The witness stated that he did not receive any results from the tests of the contents of the liquid from the Liquor Licence Board, but that he was of the opinion that the said contents were liquor. He stated that he based his decision on the smell. He confirmed that nobody was intoxicated on either visit. He also stated that he was the only police officer involved in this matter who was present in court when Mr. Giortzinis and Mr. Sirilas pleaded guilty and that he gave them no advice whatsoever as to their plea. The

witness stated that he had visited the Quinta Restaurant approximately three times a week over a ten-month period and that he had no concerns with respect to the manner of operation of the premises on his other visits. He stated that the waitress who was present on September 21st was also charged with the same offence, but that these charges were withdrawn. He stated that he and his partner attended at the licensed premises on September 21st and September 26th as a result of complaints from the Greek community with respect to after-hour service of liquor. The witness stated that he had no knowledge as to the source of the complaints.

The next witness called on behalf of the Board was Steve Holubko who was an Investigator with the Liquor Licence Board for the past eight years. He stated that he attended at the Quinta Restaurant on February 16th, 1986 at approximately 12:15 a.m. and that many patrons were just arriving at the licensed premises at that time. He stated that he was able to obtain a drink after the official closing hour of 1:00 a.m. and that after 1:45 a.m. while he was present, drinks were served in coffee cups rather than in regular glasses. The witness stated that he ordered a shot of brandy after 1:45 a.m. when he was seated in the service bar and that the brandy was served to him in a coffee cup. The witness stated that the premises were crowded with patrons standing in several areas. He stated that he did not know the Licensee and that he had only been at the Quinta Restaurant on one previous occasion to familiarize himself with the premises.

On cross-examination, the witness stated that he had made notes of the event, but that they were not available with him at the hearing before the Tribunal. He stated that his supervisor had directed him to attend at the licensed premises because of an anonymous complaint. He stated that he ordered and received a drink of liquor between 1:20 a.m. and 1:30 a.m. on the morning of February 16th, 1986. The witness stated that he originally arrived at the licensed premises on the evening of February 15th, 1986, at approximately 11:00 p.m. and stayed until 2:20 a.m. on the morning of February 16th, 1986. During that period he had three drinks consisting of one beer at 11:00 p.m., one beer at 1:15 a.m. and one brandy at approximately 2:00 a.m. The witness stated that he saw liquor being poured at the bar, being served from shot glasses into coffee cups. He stated that during this period of time he had casual conversation with the bartender and that Bill Giortzinis appeared to be in charge of the premises. The witness stated that most of the patrons were of Greek origin in his opinion and that there were no intoxicated or unusually loud customers.

The next witness called on behalf of the Liquor Licence Board was Police Constable Peter John of the Metropolitan Toronto Police Force who stated that he was familiar with the Quinta Restaurant and that he visited the premises according to his notes on February 28th, 1986, working in an undercover capacity. He stated that at approximately 1:05 a.m., he was dropped off and entered the premises with the intention of purchasing liquor. He stated that he arrived at 1:15 a.m. and sat at the bar and asked for a beer. The witness stated that he was served by the bartender Tom Sirilas. The witness stated that at 1:47 a.m., he was joined by his three partners and ordered one round of ouzo at a cost of \$6.00 per shot. The witness stated that at 2:55 a.m., members of 55 Division of the Metropolitan Toronto Police Department entered the premises and spoke to the proprietor. The witness stated that the four original officers proceeded to leave. The witness stated that as he was leaving Tom Sirilas gave him a card and asked him to say that he had been served no liquor after 1:00 a.m. The witness stated that during his stay in the premises, the bartender had served alcohol to many persons. He stated that he did not know the Licensee Nina Giortzinis, but that the bartender Tom Sirilas appeared to be in charge of the premises.

On cross-examination, counsel for the Licensee objected to the admissibility of the evidence of Police Constable John because the Notice of Proposal issued on the 18th day of December, 1986, referred to the date of March 1st, 1986 at 1:55 a.m. as being the time of one of the instances of contravention of the Act while the evidence of the police officer was that this incident occurred on the morning of February 28th, 1986.

The next witness called on behalf of the Board was Police Constable John Tierney of the Metropolitan Toronto Police Department who advised that he attended at the Quinta Restaurant on February 28th, 1986, with his partner and at that time saw a waiter removing glasses with clear liquid. He advised the bartender that charges would be laid against the Quinta Restaurant and the proprietors and that to his knowledge charges were still pending. He stated that he had no actual evidence with respect to the serving and selling of liquor after 1:00 a.m.

The next witness called on behalf of the Board was Police Constable Robert Culkin of the Metropolitan Toronto Police Force who advised that on the early morning of Sunday, September 7th, 1986, he was working with a female undercover

officer who entered the premises at 1:17 a.m. The witness stated that he subsequently entered the premises at 1:30 a.m. at which time he identified himself to Bill Giortzinis and pointed out the policewoman sitting at the back of the dining lounge drinking white wine. He was advised by the policewoman that she had purchased this wine at 1:22 a.m. from the bar and the officer stated that he tasted the wine and identified it and directed the wine to be seized. Mr. Giortzinis was advised that he would be charged and that charges would also be laid against his wife Nina Giortzinis as Licensee and against the bartender. The witness stated that the wine was tested by the Liquor Licence Board and that the report received from the Board indicated that it contained 11 per cent alcohol. The witness stated that Bill Giortzinis was in charge of the premises at the time. The witness also testified that he attended at the Quinta Restaurant on September 20th, 1986, having arranged for two undercover policewomen to enter the dining lounge at approximately 1:25 a.m. The officer followed them in at 1:45 a.m. and approached their table. He testified that one of the undercover officers had ordered wine at 1:30 a.m. and was served at 1:32 a.m. Police Constable Culkin tasted the wine which she had ordered. He testified that it was wine and seized it for testing purposes. The witness testified that the results indicated that it was white wine testing 11 per cent alcohol. He advised the bartender Theo Gerodimos that he would be charged along with Bill Giortzinis and Nina Giortzinis. The witness testified that Theo Gerodimos was convicted on November 26th, 1986 of serving alcohol after 1:00 a.m. contrary to Section 9 of Regulation 581 of the Act. He testified that the charges were pending against the other persons charged.

On cross-examination, the witness testified that he made the notes to which he referred in giving his evidence when he returned to the station about 2:00 a.m. on the dates in question. He stated that the undercover policewoman was Police Constable Kimberley Carey and he had no knowledge if she had a watch. He testified that he checked his own watch with respect to the times to which he had testified and he confirmed the times directly with her. The witness stated that he had visited the licensed premises six or seven times in the past year and he knew of no other violations. He stated that Nina Giortzinis was charged as the owner of the premises. The witness testified that he took the liquor to the Board for testing, which testing was done by the chemist for the Liquor Licence Board and he arranged to pick it up after the testing. With respect to the incident of September 20th, 1986, the witness stated that he had no knowledge if the undercover

policewomen had watches, but he compared the times with them and verified that the times were the same. He had no personal knowledge as to the time that they purchased the liquor.

The next witness called on behalf of the Liquor Licence Board was Police Constable Robert Martin of the Metropolitan Toronto Police Department. He testified that he was familiar with the Quinta Restaurant and had attended on the early morning of November 8th, 1985, arriving at the restaurant at 4:08 a.m. He testified that the front door was open and approximately 15 patrons were in the premises. He stated that three women and one man were sitting at one table with three shot glasses of liquor in front of them. One of the persons, Vasilios Xeros, was charged with bringing liquor onto the premises and admitted that he was drinking grappa which, he stated, he brought with him. The witness testified that Xeros pleaded guilty of bringing liquor onto licensed premises contrary to the provisions of the Liquor Licence Act and that the charges against Bill Giortzinis were withdrawn.

On cross-examination, the officer testified that there was no attempt to conceal the bottle of grappa behind the bar and he confirmed that Bill Giortzinis stated that he did not know that the patron had brought the wine onto the premises. He confirmed that he had visited the premises on other occasions after 1:00 a.m. and that there had been no other infractions to his knowledge prior to the incident of November 8th, 1985. He stated that there had been no analysis made of the grappa, but that it was clear to him that it was an alcoholic beverage.

Counsel for the Board called Police Constable Stan Bydall of the Metropolitan Toronto Police Force who testified that he attended at the Quinta Restaurant on the early morning of November 29th, 1986, to check the premises after the closing hours of 1:00 a.m. He stated that he was accompanied by Sergeant Kelly and other officers and at the time saw glasses being cleared. He seized two coffee cups and smelled the beverage in the cups and the witness testified that the beverage was of an alcoholic nature.

He also stated that there were open bottles of liquor on the bar. He stated that he saw no patrons being served and had no idea where the liquor came from. The witness testified that he returned to the police station around 3:40 a.m. with the beverage that had been seized and put it into a sample bottle number C073341. He testified that the sample was submitted to the chemist for the Liquor Licence Board on

December 1st, 1986, and returned to him on December 15th, 1986 with a certificate indicating 29 per cent alcohol. Charges were laid against both Nina Giortzinis and Bill Giortzinis and these charges are still outstanding. The witness testified that he again attended at the premises at 3:50 a.m. on the morning of December 13th, 1986, and observed various patrons with coffee cups and glasses. He advised Bill Giortzinis that he would be charged and he testified that Mr. Giortzinis told him to take the liquor licence as the premises would be closed anyway. The witness produced a certificate of business registration under the Partnership Registration Act registered February 18th, 1985, which stated that Nina Giortzinis and Tom Sirilas were carrying on business as partners under the firm name of the "Quinta Restaurant". The witness stated that he checked the beverages on the table which were seized on December 13th, 1986, and smelled the contents and confirmed that they were alcoholic in nature.

On cross-examination, he confirmed that there had been no analysis of the contents of the coffee cups and glasses. He also confirmed that he had no knowledge that the Licensee had ever been involved in the sale of alcoholic beverages to minor or intoxicated persons.

The next witness called on behalf of the Liquor Licence Board was Police Constable Wayne Wright of the Metropolitan Toronto Police Department. He confirmed that he was present with Sergeant Kelly and Police Constable Bydall at 3:20 a.m. on November 29th, 1986, when they entered the Quinta Restaurant. The witness stated that he saw a waiter taking a substance to the bar area. He stated that he walked to a table where a patron was trying to hide a cup. The officer stated that he seized the cup and the contents and submitted their contents to be analyzed. He stated that he received a certificate of analysis from the chemist of the Liquor Licence Board confirming that the liquid tested 26.4 per cent alcohol by volume. Counsel for the Applicant at this time objected to the reports being tendered and submitted that pursuant to the provisions of Section 10(3)(d) of the Ministry of Consumer Affairs Act, the contents of the report should have been available prior to this hearing. Counsel for the Liquor Licence Board referred to the provisions of Section 58 of the Act which permits certificates of analysis to be submitted as evidence and the Tribunal overruled the objection of counsel for the Applicant with respect to the admission of the said reports.

On cross-examination, the witness confirmed that he had made between three and five visits to the Quinta Restaurant.

uring the past year and that he saw no evidence of the sale of liquor. He stated that the bar was open and that bottles were in the bar area in open view of the public. He stated that when he walked in on the last occasion, there were approximately 65 persons present. The witness stated that he questioned a patron with respect to the cost of a drink. The patron advised him that he did not know the cost as somebody else had bought it. On re-examination, the witness stated that with respect to his visit at 4:05 a.m. on January 4th, 1987, there were approximately 25 people in the restaurant and that he had seized the liquor on this occasion and had it analyzed. He stated that he received back a certificate showing the liquor to be 37.4 per cent alcohol. Counsel for the Applicant submitted a formal objection to the certificate because of lack of notice of the said report.

The last witness called on behalf of the Board was Sergeant James Kelly of the Metropolitan Toronto Police Department. He testified that he was the supervising Sergeant of the plainclothes officers in Division 55 and that he was familiar with the Quinta Restaurant. He stated that after he took over the Division on November 17th, 1986, he had been briefed on problems in the area and attended the Quinta Restaurant to talk with the manager Bill Giortzinis. He advised Mr. Giortzinis that he was aware of the previous problems and that he would not tolerate a continuation of the prior conduct.

On Saturday, November 29th, 1986, Sergeant Kelly testified that he entered the premises at 3:20 a.m. and that there were approximately 80 people in the bar area with the music playing. The floor was covered with money and some waiters were removing cups and glasses in a hurry as he came into the bar area. He stated that the bar area was open and that bottles were within reach. He showed the contents of two cups to Mr. Giortzinis and when asked why he did not remove signs of sale and service after hours he stated that Bill Giortzinis merely said, "Just business." Sergeant Kelly also testified as to the events on December 13th, 1986 and the seizures of police officers at 3:50 a.m. on that occasion. He testified that he advised Bill Giortzinis at that time that he could be charged and Bill told him to take the licence as he would lose it anyway. Sergeant Kelly testified that he took the liquor licence and gave a receipt to Bill for it. He stated that he had never met Nina Giortzinis.

On cross-examination, Sergeant Kelly stated that he made it a point to make the Quinta Restaurant and other

establishments in his area aware that he would not tolerate further infractions. He stated that he assumed that Bill Giortzinis advised his wife in his capacity as manager of the breaches of the Liquor Licence Act and the charges that were being laid. He stated that the problems at the Quinta Restaurant, in his opinion, were severe because of the general disregard of the provisions of the Liquor Licence Act.

The first witness called on behalf of the Applicant was Vasilios (Bill) Giortzinis who confirmed that he was the husband of Nina Giortzinis and that he was the manager of the Quinta Restaurant. He stated that he had no restaurant experience prior to 1985 when he designed and built the Quinta Restaurant. He stated that he works the nightshift from 7:00 p.m. to 3:00 a.m. and that the premises are open every day. The witness testified with respect to the incident of November 29th, 1986 and stated that he was not working that night, but returned to the restaurant after 1:00 a.m. He stated that Tom Sirilas was the manager that night when Sergeant Kelly and other officers walked in. The witness advised that he had been drinking that evening and admitted that he had told Sergeant Kelly to take the licence. He stated that there had been many visits from the police over the last year and a half and that there had been an apparent complaint from the Christina Restaurant, but no direct complaint to him. He also testified with respect to the incident of September 21st, 1985 when Bill Xeros, a customer, brought a bottle of grappa into the restaurant and was drinking with the staff at the staff table using bar glasses. He stated that the charges against him were dropped with respect to this incident.

The witness confirmed that there was live entertainment from Wednesday through Sunday, inclusive, and that the band usually played until 3:00 a.m. Most business was done between 11:00 p.m. and 3:00 a.m. on the week-ends. During the week, most customers came in after 1:00 a.m. for food, coffee and softdrinks. He stated that the band gets the tip money of \$1.00 bills which are thrown on the floor. He stated that if customers bring in liquor from outside and use coffee cups to drink it, he will have the customers evicted if he finds out. He stated that some waitresses had been fired for not carrying out the proper rules. He stated that when the employees finish their shift around 4:00 a.m., they very often will have a drink at the staff table and will get their own drinks. He confirmed that the restaurant would not be closed because they never closed the door at the street level but that the lights would be turned down. He confirmed that there was no system to put the liquor bottles in the cabinet. The

Witness stated that he never allowed alcoholic drinks to be served after 1:00 a.m. and that some inexperienced staff may have tried but that if he found out, he would fire them. He confirmed that four bartenders had been fired in the past year and the witness confirmed that his wife Nina Giortzinis looked after the books. He reiterated that he had no knowledge of service of liquor after 1:00 a.m. and would not allow this to happen.

On cross-examination, the witness stated that he reported to his wife any events which happened with respect to the premises and that he discussed with her the Notice of proposal dated March 25th, 1986. He also confirmed that he had pleaded guilty to two charges under the Liquor Licence Act in April of 1986 and that in June of 1986, he appeared without counsel before the Liquor Licence Board. The witness was questioned with respect to the price of \$4.00 per cup for coffee, but stated that it was reasonable because of the cost of the band and that he knew that some customers might have a bottle of cognac in their pocket. He confirmed that Tom Sirilas was in charge of the bar and that he is a part-owner.

On re-examination, the witness stated that he had no legal advice with respect to the charges laid against him and that a police officer had suggested that he plead guilty so as not to affect Nina's position as licence holder. He stated that Mr. Sirilas had become a part-owner and he did not know that there should have been a transfer application with respect to the change of ownership.

The next witness called by the Applicant was Tom Sirilas who confirmed that he was a 50 per cent owner in the business. He originally had put up the sum of \$100,000.00 at the time the lease of the premises had been signed and the liquor licence application submitted. He stated that he did not bother to have the liquor application changed and had his lawyer register the declaration of partnership under the Partnership Registration Act and had never attempted to hide his interest in the business. The witness stated that he had acted as host for the past five to six months and works from 1:00 p.m. to 3:00 a.m. five days a week. The witness stated that usually there was a large crowd between 1:30 a.m. and 1:45 a.m. and that it was difficult for the waitresses to clear the tables as they were often short of staff. He confirmed that there was a high turnover of staff and that several waitresses and bartenders had been fired. The witness confirmed that he had one conviction under the Liquor Licence Act as a result of an incident in March of 1986, at which time he pleaded guilty.

He stated that he had been advised to plead guilty in order to protect the licence of Nina Giortzinis so that a conviction would not go against the licence. The witness confirmed that the proposed purchaser of the business was his wife Mary Sirilas who had set up a new company and that if the sale is approved, the witness would still be working there. On cross-examination, the witness confirmed the incident with Constable John in February of 1986 when he was advised that he would be charged with serving beer after hours. He stated that he does not remember the ouzo incident of February 28th, 1986. He stated that very often there are more than 90 people in the premises after 1:00 a.m. and that his revenue is as much as \$1,000.00 per night. When asked why he pleaded guilty, he stated that the evidence was there and the glasses were still on the tables and that put him on the spot. He acknowledged that there was no system of control and that the waitresses would go behind the bar to get the coffee and would often provide booze on the side to the customers. The witness stated that his wife Mary Sirilas had worked at the Quinta Restaurant during the luncheon period for the last six months and knew what things should be done properly.

Counsel for the Applicant called the Licensee Nina Giortzinis, as well as Mary Sirilas and the bartender Theodoros Gerodimos and they explained their various responsibilities at the Quinta Restaurant.

At the conclusion of the evidence, it was agreed between counsel for the Liquor Licence Board and the Applicant that the evidence on the second Proposal should be construed as applicable to the first Proposal and that the two Proposals should be treated as one Proposal. Counsel for the Board proceeded to call as its only witness with respect to the first Proposal, Frederick John Moffat, an Investigator with the Liquor Licence Board who had submitted the report associated with the first Notice of Proposal dated March 25th, 1986. The report was filed as an exhibit in these proceedings, which report confirms among other things, that on November 16th, 1985 at 1:15 a.m., the witness was served with a cognac and that after 2:00 a.m., he observed the male bartender pouring various alcoholic beverages into shot glasses and giving them to the waitresses who served them to patrons sitting at tables in front of the establishment. The witness confirmed that he was served with another cognac with coffee at 2:20 a.m. On cross-examination, the witness confirmed that he had prepared the report on November 19th, 1985 and signed it. He stated that he did not have his notes as they had been stolen after the report had been prepared, but that he was very careful with

the times as set out in the report as they were pertinent to the investigation. The witness confirmed that the report specifies that the date was Friday, November 15th and acknowledged that November 15th was a Thursday. Counsel requested the Tribunal to take judicial notice that November 15th, 1985 was a Thursday and filed as an exhibit, a calendar for 1985.

Prior to the commencement of argument, counsel for the applicant submitted a motion to the Tribunal that the Order for suspension issued by the Liquor Licence Board on June 17th, 1986 was a nullity for two reasons. His first ground was there had been a denial of right to counsel. He submitted that a letter requesting an adjournment had been submitted to the Board and that this had been followed up by a call to the Board. The Liquor Licence Board by proceeding with the hearing had denied the licence holder the right to counsel. He submitted that this was a first hearing and that there had been no prior adjournment and that the attendance by Mr. Giortzinis was for the purposes of an adjournment only. He stated that the right to counsel is one of the fundamental rights to a fair hearing. The second submission dealt with the make-up of the Liquor Licence Board in that pursuant to Section 12 of the Liquor Licence Act, the Chairman of the Board shall refer the application for a hearing to two or more members of the Board designated by the Chairman who shall constitute the Board for the purposes of the hearing and decision. Counsel submitted that this meant that the make-up of the Board must consist of two members other than the Chairman.

Counsel for the Board argued that the failure to grant an adjournment does not create a nullity and would only give a right of appeal. He submitted that a nullity would only arise as a result of some procedural matter. He further submitted that in view of the fact that the hearing before the Tribunal is by way of a hearing de novo, the Applicant is not prejudiced. After considering this matter, the Tribunal denied the motion to declare the proceedings before the Liquor Licence Board on June 17th, 1986 a nullity. The Tribunal ruled that there had been no denial of natural justice since the Applicant was represented by counsel in these proceedings and that the proceedings before the Tribunal are by way of a hearing de novo. The Tribunal also referred to its Decision in the appeal of The President Motor Hotel, Liquor Licence Act (1983), vol.7, 1.3, wherein it ruled that the Chairman of the Liquor Licence Board is a member of the Board and can be one of the persons designated for the purposes of the hearing and decision of the Board.

Counsel for the Liquor Licence Board submitted in argument that the Proposal to revoke the licence issued on the 18th day of December, 1986, was based firstly on the breach of Section 9(1)(a) of Regulation 581 of the Liquor Licence Act dealing with the sale of liquor outside permitted hours and, secondly, under Section 9(22) of the said Regulation dealing with the failure to remove all evidence of the service and consumption of liquor within 45 minutes after the sale and service of liquor ceases in the licensed premises. Counsel argued that sufficient reasonable information had been given the Applicant in paragraphs 3.(a) and (b) of the Notice of Proposal to enable the Applicant to meet the allegations made against her. Counsel referred to the Divisional Court decision of Re: Kellar and College of Physicians and Surgeons, 17 O.R.(2d), 516, where Mr. Justice Lerner stated, "It is trite law that the Applicant is entitled to know with particularity the charges that he has to meet. It does not necessarily follow that he is entitled to know the evidence by which these charges may be proven."

Counsel also pointed out that the incident of January 4th, 1987 had been brought out in cross-examination and the Statutory Powers Procedure Act does not preclude issues raised by the opposing parties. He also referred to Section 58 of the Liquor Licence Act which provides that "the certificate or report as to the analysis of any liquor...is conclusive evidence of the facts stated in the certificate or report", etc. Counsel proceeded to review the evidence of the various police officers with respect to the various allegations made in the Notice of Proposal. He also pointed out that the Board had issued a Notice of Proposal to suspend in March of 1986 and that this should have caused the Licensee to change her method of operation with respect to the operation of the premises after 1:00 a.m. The Licensee knew of the problems since March of 1986, but took no steps to correct the problems and did not attempt to institute any new system to comply with the provisions of the Liquor Licence Act. Most customers did not arrive until after midnight and that revocation of the licence is the only solution. He submitted that the request for transfer should not be countenanced since Tom Sirilas is real part of management at this time. There must be a deterrent to show that the very serious breaches of the Liquor Licence Act committed by the Licensee will not be tolerated.

Counsel for the Licensee argued that the Applicant was aware of the severity of the matters before the Tribunal after the Decision of the Liquor Licence Board on June 17th, 1986, but that the only hard evidence before the Tribunal is the

evidence of the prior convictions. He argued that serious steps had been taken to formally transfer the licence by incorporating a new company, arranging financing and preparing all of the necessary documents. He acknowledged that the purported change of ownership was not reported, but that all of the witnesses had been candid. He argued that Nina Giortzinis is not a mere nominee, that the licence had been issued to her and that she did exercise a managerial role. Counsel referred to the provisions of Section 10(3)(b) of the Ministry of Consumer Relations Act and the right of the Licensee to examine any reports or documentary evidence to be submitted in any proceedings under the Act. He stated that the Applicant had had no opportunity to inspect or review the police files and that the certificates of analysis should have been made available to the Applicant, but that counsel for the Board had not even disclosed that the certificates would be tendered as evidence. Counsel submitted that Section 58 of the Liquor Licence Act is similar to the provisions under the Criminal Code with respect to the filing of certificates, but that the Code requires strict procedures to be followed and that the certificates should not be accepted as proper evidence.

Counsel for the Applicant then proceeded to review the evidence with respect to the specific occurrences as outlined in the Notice of Proposal. He submitted that the Liquor Licence Board in drafting the Notice of Proposal must take care in ensuring that the information laid out in the Notice of Proposal is correct because the information submitted in the Notice of Proposal creates an onus on the Licensee with respect to these particular occurrences. Counsel submitted that a lot of the evidence was hearsay evidence dealing with information obtained by one police officer from other police officers involved in the various investigations. He gave the example of the evidence of Constable Culkin relating to the incidents of September 7th and 20th, 1986, where an undercover policewoman was involved. Counsel argued that the best evidence had not been made available to the Tribunal and that the undercover police officer should have been called as a witness to testify firsthand. Counsel also referred to various discrepancies in the dates and times. He referred to the evidence of Police Constable Peter John who advised that he had attended the premises on the morning of February 28th, 1986, while the Notice of Proposal referred to this incident as being on the morning of March 1st, 1986. Counsel also objected to the evidence of analysis as tendered and referred to an incident on September 26th, 1985 as merely being referred to in the evidence as September 26th with no reference to the year in which the incident occurred. Counsel also argued that the

evidence of pouring spouts still being in bottles was no evidence of the sale and service of liquor after hours. Counsel argued that the thrust of the Board's evidence referred to a number of incidents revolving around the failure of the Licensee to clear evidence of the sale of liquor after hours and the sale of liquor on four specific dates. He argued that all of the evidence was inadequate and that no evidence at all was called with respect to an incident referred to in the Notice of Proposal as occurring on February 6th, 1986. Counsel argued that the honesty and integrity of the Licensee had not been challenged, that there was no evidence of the sale to minors or drunks and that there was no evidence that any false or improper returns had been filed pursuant to the requirements of the Liquor Licence Act. He argued that the only proper and valid evidence against the Licensee was that of a contravention of the regulations with respect to the clearing of the tables and that there had been some convictions with respect to the sale of liquor after hours. He submitted that the evidence did not warrant the revocation of the licence and that a suspension would be adequate under the circumstances.

After reviewing the evidence and the submissions made to the Tribunal in this appeal, the Tribunal finds that the Licensee has been in contravention of the Liquor Licence Act and the regulations relating to the said Act with respect to the Notice of Proposal of March 25th, 1986 and the subsequent Notice of Proposal dated December 18th, 1986. The Tribunal is satisfied with respect to the evidence permitting liquor other than that sold under the authority of a licence to be brought upon the licensed premises, the evidence that the Licensee failed to remove evidence of the service and consumption of liquor within 45 minutes after the sale and service of liquor ought to have ceased in the licensed premises and that liquor was sold and serviced in the licensed premises after the regular closing hours permitted under the said licence. The Tribunal accepts as evidence the convictions of certain of the employees with respect to the sale and service of liquor after hours, the evidence of the certificates of analysis pursuant to the provisions of Section 58 of the Liquor Licence Act and accepts as evidence, the hearsay evidence of certain of the police officers with respect to information received by certain other undercover police officers. Under the provisions of the Statutory Powers Procedure Act, the Tribunal is entitled to accept hearsay evidence and it is then the responsibility of the Tribunal to weigh the importance of the said evidence. The Tribunal is of the opinion that the failure on the part of the Board to call the undercover police officers does not prejudice the defence of the Applicant since the direct evidence of the

police officers who did testify corroborates the information received from the undercover officers.

The Tribunal has given much consideration to the question of the penalty which should be imposed in this appeal. The Licensee was in serious breach of the regulations and there were various breaches which occurred after the issuance of the first Notice of Proposal and after the hearing before the Board. It was argued by counsel for the Board that such a blatant disregard of the provisions of the statute and regulations could only be adequately dealt with by a revocation of the licence. The Tribunal, however, would point out that although certain of the incidents documented in the second Notice of Proposal occurred subsequent to the Decision of the Liquor Licence Board on June 17th, 1986 with respect to the first Notice of Proposal, the first Notice of Proposal was still under appeal. The Tribunal is, therefore, prepared to consider the incidents as set out in the two Notices of Proposal as one set of incidents relating to the sale of liquor after hours and the failure to clear the tables of signs of the sale and service of liquor contrary to the provisions of the Act and regulations. Counsel for the Applicant has pointed out that the Applicant is not guilty of the sale to minors or intoxicated persons and the Tribunal is prepared to give the Applicant the benefit of the doubt with respect to the continued breaches.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal varies the Decision of the Liquor Licence Board dated the 17th day of June, 1986 and the Notice of Proposal of the Board dated the 18th day of December, 1986, and directs that the liquor licence of the Licensee for the said premises be suspended for a period of thirty days. The Tribunal directs the Board to set the date of commencement of the said suspension.

SOPHIE MARY HUMENIUK
(ALLISTONIA HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE
AND LOUNGE LICENCES

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
RONALD W. CHEMIJ, Member

APPEARANCES:

WILLIAM J. GLUDISH, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 23 April 1987

Toronto

REASONS FOR DECISION AND ORDER

We have heard the evidence of Mr. A. McInnes, Inspector for the Liquor Licence Board, and we have seen the documents that were required to be filed by the Applicant and have now been filed. Since Mr. Grannum does not press the 21 day suspension, the Tribunal will Order that the Decision and Order of the Liquor Licence Board to impose the 21 day suspension not be proceeded with at this time. There will be no terms or conditions attached to the Order, and we will not be giving any further written reasons for our Decision.

Earlier by Order of the Tribunal dated June 24th, 1986, a Stay of Order was granted. Now by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Order of the Liquor Licence Board of Ontario dated the 13th day of June, 1986.

JAMES BAY HOTEL & RESTAURANT EQUIPMENT LTD.
(COLONEL HOAGIE'S RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE THE APPLICATION FOR A DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

PEARANCES:

REMI RIVET, agent for the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

ED RICHARDS, a Party

NANCY TREMBLAY, a Party

DATE OF HEARING: 21 July 1987 North Bay

REASONS FOR DECISION AND ORDER

This is an appeal by the Applicant from the Decision of the Liquor Licence Board of Ontario dated the 19th day of May, 1987, whereby the Board refused the application for a dining lounge licence in respect of the premises known as "Colonel Hoagie's Restaurant" situate at 1128 O'Brien Street, the City of North Bay.

James Bay Hotel & Restaurant Equipment Ltd. submitted an application for a dining lounge licence and patio dining lounge licence for the premises on the 1st day of August, 1986 and, after a public meeting held on the 2nd day of December, 1986, the Liquor Licence Board issued a Notice of Proposal to refuse to issue a dining lounge licence for the said premises. The Applicant required the Liquor Licence Board to hold a hearing pursuant to the provisions of Section 11(3) of the Liquor Licence Act, which hearing was held on the 7th day of April, 1987, and as a result of such hearing, the Liquor Licence Board issued its Decision on the 19th day of May, 1987 refusing the application for the said licence.

The only issue in this appeal is whether the issuance of the licence is or is not in the public interest having

regard to the needs and wishes of the public in the municipality in which the premises are located as set out in Section 6(1)(g) of the Liquor Licence Act.

The first witness called in opposition to the application was Mrs. Nancy Tremblay who had been added as a party to the proceedings. Mrs. Tremblay resides in the area and described the area as being mainly a residential area. Colonel Hoagie's Restaurant is located on O'Brien Street immediately south of its intersection with Highway No. 17 which is part of the Trans Canada Highway running through North Bay. The witness filed as an exhibit a map of the area which disclosed the existence of six schools in the area. The witness testified that she had approached the principals of all of the schools in the area and that teachers from five of the schools signed a petition which was filed with the Tribunal opposing the issuance of the licence. The witness also filed a petition from people within the area opposing the issuance of the licence. The preamble of all of the petitions submitted as evidence was prepared by Mrs. Tremblay. There were a total of 92 names on the petitions opposed to the granting of the licence. The witness also referred to fourteen letters which were part of the record filed in the proceedings objecting to the issuance of the said licence. The witness testified that she was opposed to the issuance of the licence because of the fact that there are so many schools in the area and that the premises are located close to a dangerous intersection being the intersection of O'Brien Street with Highway No. 17. The witness also testified that she had reviewed the petition filed in support of the application for the licence and found that of 178 signatures on that petition, 90 people lived within the boundary of what she considered to be the immediate area and 88 people lived outside of the immediate area. The witness testified that there is another Colonel Hoagie's Restaurant located at a considerable distance from the location of the subject premises, which restaurant is already licensed, and the witness confirmed that she had no knowledge of any rowdyism at the other premises. The witness filed as an exhibit a photograph of the building in which Colonel Hoagie's Restaurant is situated showing it to also include a variety store and a pizza store.

The next witness called by counsel for the Board was Donald Houle, the Principal of St. Joseph Scollard Hall, a private secondary school which is situated approximately four blocks from Colonel Hoagie's Restaurant. He stated that there are about 1,050 students between the ages of 14 and 19 who attend Scollard Hall. The witness stated that he was opposed

to the issuing of the licence on two main grounds: (1) this type of establishment attracts a younger clientele; and (2) the intersection of O'Brien Street and Highway No. 17 is a dangerous intersection and that anything that might contribute to an increase in the danger is bad. He stated that he has lived in this area of 19 years. On cross-examination, the witness acknowledged that he was familiar with Harvey's Restaurant which is a licensed premises in the area and that it could draw the same type of crowd. The witness stated that he had never been in the Licensee's premises.

Two more witnesses were called by counsel for the Liquor Licence Board who were opposed to the application. Sandra Fischer testified that at one time, she lived directly across from Colonel Hoagie's Restaurant and that in 1979, she was involved in a motor vehicle accident when she was struck by a car while crossing O'Brien Street. She testified that there was no alcohol involved in this accident. Her main concern was the fact that the restaurant was located near a dangerous intersection. She testified that she has been to Colonel Hoagie's Restaurant on many occasions and that many teenagers frequent the variety store adjacent to Colonel Hoagie's Restaurant. On cross-examination, she acknowledged that Colonel Hoagie's Restaurant has expanded and has been divided into two separate sections - one being a dining lounge area and the other being a separate fast food service area.

The final witness called in opposition to the application for the licence was Ed Richards who was a party to the proceedings and who resides on O'Brien Street. He confirmed that he had taken up some of the petitions but that the preamble had been prepared by Mrs. Tremblay. He stated that he was opposed to the sale of alcohol in any form and was a member of a church in the immediate area. He stated that if something does not enhance the area, it is not good for it. On cross-examination, he stated that he was strongly opposed to the use of alcohol in any form and that he objected to the issuance of a dining lounge licence because he felt that there were no bonuses from the sale of alcohol in the community.

The first witness called on behalf of the Applicant was Remi Rivet, the President of James Bay Hotel & Restaurant Equipment Ltd. The witness stated that the original application included an application for a dining lounge patio licence, but that this application was being withdrawn and the application revised to be only for what was shown as dining lounge number 2 which was the new addition to the restaurant. The original Colonel Hoagie's Restaurant was a separate section

for take-out fast food in the old section and this was completely separated from the new dining lounge by the kitchen which was situated between the two restaurant areas. The witness testified that there was a separate entrance for each area and that the fast food section was in no way connected to the dining lounge where liquor would be sold. The witness testified that he had been in the restaurant business for twelve years and had prior experience with licensed premises. He had no prior liquor convictions of any kind. He also testified that Journey's End Motor Hotel is situated immediately across Provincial Highway No. 17 from Colonel Hoagie's Restaurant on the northeast corner of Highway No. 17 and O'Brien Street and that there is no restaurant in that motor hotel. Colonel Hoagie's Restaurant is the closest restaurant.

On cross-examination, the witness stated that he had completed the renovations to the premises including the construction of the new dining lounge in August of 1986 and that his proposed hours of operation were from 7:00 a.m. to 11:00 p.m. in order to accommodate the patrons of the Journey's End Motor Hotel. He stated that there was a take-out window in the fast food premises which is mainly used to serve young people purchasing french fries. He stated that during the winter very few students come from any of the schools since all of the schools have their own cafeterias and it is too far and too cold. He further acknowledged that traffic is heavy on O'Brien Street during the dinner hour, but that there is a properly identified fenced parking lot which controls access to O'Brien Street.

The next witness called on behalf of the Applicant was Tony Costakos who was the landlord of the premises. He stated that the building took up approximately 3,150 square feet and that between 8,000 and 9,000 square feet were available for parking. He stated that the parking area was fenced with two entrances and he had no knowledge of any accident ever having happened involving cars entering or leaving the parking lot at Colonel Hoagie's Restaurant. He stated that this property has been used as a commercial property for the past sixty years. He stated that he visits the area every day and that there are very few children in Colonel Hoagie's Restaurant.

Michael Costakos, a son of the landlord, also testified that he was a student at Scollard Hall who was in grade 13 and that if the students at Scollard Hall were going to go to a restaurant at noon, they would usually go to the Cortena Restaurant or Casey's which were both licensed premises.

n the area of the school. He stated that very few students ever went to Colonel Hoagie's Restaurant and that on the few occasions he had ever gone to Colonel Hoagie's Restaurant, he had only made purchases at the take-out area. He stated that it was not a good idea to drink during school hours.

On cross-examination, the witness stated that the students mainly went to Cortena's and Casey's because of the luncheon specials. He also testified that there were three lunch hours at Scollard Hall and that the cafeteria is large enough to accommodate all of the students attending the school. He stated that the availability of alcohol at Cortena's did not influence the student's decision to go to that restaurant. He stated that there was a better selection of food and the music was better.

The final witness called on behalf of the Applicant was Frank Horvath, a customer of Colonel Hoagie's Restaurant. He stated that Colonel Hoagie's Restaurant had a good reputation. The witness is a real estate agent who has been in business for twelve years and he described the premises. He stated that the original old section of Colonel Hoagie's restaurant had been turned into a fast food area similar to MacDonald's while the new section for which the dining lounge licence is proposed is set up as a dining lounge with tables and chairs together with a bar along one side of the dining lounge. He confirmed that Colonel Hoagie's Restaurant was important to the people staying at the Journey's End Motor hotel because it was close enough to walk from the motel to the restaurant.

Counsel for the Liquor Licence Board summarized the evidence and confirmed that the application was revised to be only for a dining lounge licence for area number 2 for a maximum of 34 persons with liquor sales from 11:00 a.m. to 11:00 p.m. from Monday to Saturday, inclusive, and from 12:00 noon to 11:00 p.m. on Sunday. He stated that this is a small commercial area including the restaurant, a pizza store and a variety store which is surrounded by a residential area. He referred to the petitions filed in opposition to the issuance of the licence, together with the various individual letters which he stated should carry some weight. He specifically referred to the petitions opposed to and supporting this application and submitted that it was a question for the Tribunal as to whether the objectors have satisfied the onus.

Counsel referred to the Decision of the Tribunal in the appeal of Savannah Hotel (1984), CRAT Vol. 13, p.63, where

it was held that the onus under Section 6(1)(g) of the Liquor Licence Act is on the objectors to show that the issuance of the licence is not in the public interest and the question is whether the objectors have satisfied that onus. Counsel also referred to the Tribunal's Decision in the appeal of Shangra-1 Restaurant (1979) LLAT Vol. 3, p. 117, but that the difference between that Decision and this appeal was that there was opposition from City Council of the City of Peterborough in addition to the opposition of the residents. In this application, there is no evidence of any resolutions of the municipal council opposing the application or any opposition from any formal ratepayers' groups. He stated that the needs and wishes of the opponents to the licence can only be satisfied by refusing to issue the licence. He referred to the concerns of the opponents to the licence, as including the evidence of existing licences as being sufficient to serve the area, the number of secondary school students in the area, the attraction of the existing variety store and pizza store to young people, the question of the dangerous intersection and the question of there being sufficient parking and access to the parking areas.

Nancy Tremblay also submitted in argument that she had become involved as a parent and citizen because of the invitation of the Liquor Licence Board to submit objections to the application and that the residents of the area have expressed their concerns. She reiterated that there were more than enough licensed premises in the immediate area.

Mr. Rivet, in submitting argument for the Applicant, referred to the petitions filed in support of the application being submitted on behalf of residents from both inside and outside the area. He stated that he was a small businessman with three restaurants in the North Bay area and had a good record. There was no objection to the existing operation and small businesses were the backbone of Northern Ontario. He pointed out that no objections had been filed to the liquor licence applications for the other restaurants in the immediate area such as Cortena's and Casey's, and he questioned why people were objecting to his application. He submitted that the application for the licence for the reduced area number 2 should be granted.

In reply, Mr. Tremblay acknowledged that Mr. Rivet does have a nice business, but that he can carry on a good business without the necessity of a liquor licence.

Upon a review of the evidence and arguments submitted in this appeal, the Tribunal finds that the appeal of the

Decision of the Liquor Licence Board should be allowed with respect to dining lounge licence number 2 and that a dining lounge licence be issued for dining lounge number 2 for a maximum capacity of 34 persons.

The evidence confirmed that the present operation was being carried on in a proper manner and that the Applicant has a "nice" business. Concerns were expressed that the older high school students might be using the dining lounge, but the evidence confirming that all of the schools have cafeterias which are self-sufficient and the small capacity of the proposed dining lounge tend to support the Applicant's argument that it would not become a gathering spot for young people such as Cortena's and Casey's. Concern was expressed by the parties opposing the application that the existence of the variety store and pizza store create an attraction for younger persons, but the evidence with respect to the complete separation of the take-out area from the proposed licensed premises negates that argument in the opinion of the Tribunal. Concerns were also expressed with respect to the dangerous intersection at O'Brien Street and Highway No. 17, but if this were a criteria for the refusal of liquor licences in urban areas, there would be many existing licensed premises which would not be entitled to a licence. Petitions were filed both in support of and opposed to the issuing of the licence, but the preamble to the petitions of the opponents was prepared by Mrs. Tremblay and it would appear from the evidence, that she had also written out the form letter which was used by several of the residents of the area. The only witnesses called in addition to Mrs. Tremblay in opposition to the licence were: one resident, Sandra Fischer; Donald Houle, the Principal of Scollard Hall; and Ed Richards who acknowledged that he was opposed to alcohol on any form.

The Liquor Licence Act grants to an Applicant the right to a licence and Section 6(1)(g) of the Act places upon the objectors to a licence the onus to show that the issuance of such a licence is not in the public interest having regard to the needs and wishes of the public, but the evidence in this appeal is not sufficient to satisfy that onus. Therefore, the fundamental right to a licence should not be denied.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 19th day of May, 1987, and directs the Board to issue a dining lounge licence to the Applicant for the premises designated as dining lounge number 2 only for a maximum capacity of 34 persons when all other requirements of the Board have been satisfied.

JOHNATHAN PLACE LIMITED
(JOHNATHAN'S PLACE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO IMMEDIATELY SUSPEND THE DINING LOUNGE LICENCE
AND PATIO LICENCE

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
RONALD W. CHEMIJ, Member

APPEARANCES:

M. YAKHNI, its agent

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 30 April 1987

Toronto

REASONS FOR DECISION AND ORDER

This hearing was convened, at the request of the Applicant, Johnathan Place Limited, in order to review the Decision of the Liquor Licence Board of Ontario dated May 20th, 1986, revoking the Applicant's Dining Lounge and Patio (Dining Lounge) Licence.

The sole witness for the Applicant was Mr. Mohammed "Mike" Yakhni who admitted substantially all of the allegations put into evidence by the Liquor Licence Board Investigator, Mr. Hebbard.

Mike Yakhni is a hardworking and ambitious young man who arrived in Canada at the age of 17. He worked as a dishwasher until he was able to save enough money to purchase his own business.

In 1982, he purchased "Harry's Charcoal Pit", now Johnathan's Place Restaurant, a licensed establishment. At that time, Mike Yakhni learned that because he was neither a Canadian citizen nor a landed immigrant in Canada, he was ineligible to hold a liquor licence either personally or through a limited company of which he was the sole director. It was at this time, according to Mr. Yakhni's evidence, that

the vendors of the restaurant introduced him to Mr. Primo Pierozzi, an Inspector with the Liquor Licence Board. Mr. Yakhni testified that Mr. Pierozzi advised him to have the licence transferred to Johnathan Place Limited but to show one of the vendors as the sole director and officer of that company and as manager of the premises.

Mr. Yakhni further testified that he paid Mr. Pierozzi \$800.00 to complete the required application forms and to otherwise arrange for the transfer of the licence to Johnathan Place Limited.

Some months later, Mike Yakhni, desiring to sever any link with the previous owner, consulted Mr. Pierozzi again regarding a further transfer of the licence. As he was still not a landed immigrant, Mr. Yakhni decided to use the name of his uncle, one Fadlallah Yakhnay, a Canadian citizen, on all of the relevant application forms. Mr. Yakhni testified that he did this at the suggestion of Mr. Pierozzi. The application to transfer the licence dated October 4th, 1982, shows Fadlallah Yakhnay as President/Secretary of Johnathan Place Limited and as manager of the restaurant. Mike Yakhni admits that he signed his uncle's name to the application and the accompanying "Personal History Report". He also falsely swore an affidavit in the name of Fadlallah Yakhnay.

In 1983 and again in 1985, Mike Yakhni completed renewal applications for the renewal of the Applicant's liquor licence. Again he signed his uncle's name and falsely swore affidavits attesting that he was Fadlallah Yakhnay. He did this despite the fact that he had since acquired landed immigrant status in Canada.

Mike Yakhni admits all of these facts but claims that he acted throughout in reliance upon the advice of Mr. Pierozzi. Mr. Pierozzi was not called as a witness in this proceeding by either party.

Regardless of what Mr. Pierozzi may have told Mike Yakhni, it is clear that Mike Yakhni knew throughout that he was providing false information, including false affidavits and statutory declarations, to the Liquor Licence Board in order to obtain for himself the benefit of a liquor licence which he knew he was not legally entitled to. The Tribunal views the furnishing of false information to the Liquor Licence Board as a very serious matter which certainly warrants the revocation of the Applicant's licence.

However, the Tribunal also notes that Mr. Pierozzi was not called as a witness on behalf of the Liquor Licence Board and that no attempt was made to refute Mike Yakhni's testimony regarding the advice given to him by Mr. Pierozzi. The Tribunal also notes that Mike Yakhni freely admitted all of the relevant facts to Mr. Hebbard on the first occasion that Mr. Hebbard interviewed him.

In result, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal confirms the Decision of the Liquor Licence Board but directs that the Applicant be permitted to submit a new application for a liquor licence to the Board for the subject premises, which application is to be considered by the Board on its own merits.

ATCO INC.
(JOHNNY K RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE PATIO LICENCE

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
NEIL VOSBURGH, Member

APPEARANCES:

MICHAEL W. CAROLINE, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 9 June 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant has held a Patio (Dining Lounge) licence for the Johnny K Restaurant on Queen Street East in Toronto since May of 1982. As a result of complaints made by members of the public to the Liquor Licence Board of Ontario (the "Board"), it held a hearing to review the Applicant's licence pursuant to Section 9(1) of the Liquor Licence Act. It was the Decision of the Board to attach as a term and condition to the Applicant's patio licence the requirement that "the sale and service of alconolic beverages on the patio cease at 11:00 p.m. daily." This hearing before the Tribunal is held pursuant to Section 14(1) of the Act by way of appeal from the Board's Decision.

The nature of the complaints about the patio operation that were put into evidence before both the Board and this Tribunal related to noise allegedly emanating from the patio and disturbing residents of neighboring properties.

In its Reasons for Decision, the Board made the following findings of fact:

...We find that there is no noisy behaviour, riotous behaviour, and we are both very impressed with the efforts made by Mr. Katsouras to satisfy his neighbours and to deal with them

reasonably...We find that he is operating a good, perhaps an excellent restaurant, and eating establishment. It is not a watering hole. We find that the patrons are, by and large, well behaved and the noise is that of a dining room.

The evidence heard by this Tribunal leads it to agree with these findings of fact.

Briefly the evidence presented on behalf of the Board can be summarized as follows:

Alderman Paul Christie testified that the part of Queen Street East where the restaurant is located is now zoned "C1B1". This zoning does not permit patios such as the one annexed to Johnny K Restaurant. However, Johnny K's patio predates the passage of the present zoning by-law and therefore enjoys the status of a legal non-conforming use.

Mr. Christie stated his view that this type of use lessens the enjoyment by neighboring residents of their properties, particularly where, as in the case here, the patio is in relatively close proximity to the abutting residential uses.

The next witness for the Board was Ron Brown who resides at 104 Kenilworth Avenue. He testified that when the patio first opened in 1982, it was of a much smaller size. It was expanded in 1983 and again in 1984 to its present size. There was music on the patio in 1984, however, this was discontinued as the result of neighbours' complaints. He described the sounds which emanate from the patio now as "people noise." He likened it to "a garden party every night during the season that the patio is in operation. He complained of noise penetrating his home, particularly in the back bedrooms.

The third witness for the Board was Marion Bryden, M.P.P. who testified that she has received complaints from residents about the restaurant since 1984. The complaints she referred to related to loud noise when customers and staff cleared out after closing time, talking, laughing, cars starting, dishes and cutlery rattling. Mrs. Bryden also referred to the zoning by-law which now prohibits this type of use. She opined that it was inappropriate to continue this "special privilege" for the Johnny K Restaurant "when there are so many complaints." Under cross-examination, this witness

ndicated that she has not personally heard any noise. She also agreed that other restaurants in the area empty out at about the same time.

The Board then called Anthony Grange who resides at 99 Kenilworth Avenue. He stated that although the noise doesn't reach his home or him personally, he was here to support Mr. Brown. He agrees with the 11 p.m. closing because it fits in with the time limits imposed on the other operators.

Mr. Tom Jakobek, the Metro Councillor for Ward 9, was also called by the Board as a witness. Mr. Jakobek supports the 11 p.m. closing time because he is of the view that it is a reasonable compromise. He has received complaints in the past about noise from the restaurant. However, he testified that he has had few calls since the Board decision imposing the 11 p.m. closing. Mr. Jakobek attributed the lack of complaints to the earlier closing time which he believed to be in effect since the Board decision. In fact, as was later established by Mr. Matsouras' evidence, the patio has continued to stay open until 1:00 o'clock since the Board's decision was made due to the fact that the decision was under appeal.

Mr. Jakobek indicated that the City of Toronto does not want patio uses because of their "lack of control" and because such patios impinge on residential uses. The City passed a by-law in January 1987 to prohibit patios, however, Johnny K's enjoys a legal non-conforming use status. Mr. Jakobek said that the noise problem was inherent to this type of patio use because if there are 30-40 persons on the patio, talking, eating, and drinking, the nature of it creates some noise which varies in degree from day to day.

The Board's next witness was Peter Townsend who resides at 107 Kenilworth Avenue, which he describes as being approximately 100 feet from the patio. In the latter part of the evening, he hears sounds such as laughter, talking, glasses and cutlery clattering and the like. He supports the Board's decision to close the patio at 11 p.m.

Finally the Board called Gary Robitaille, a Board Inspector. He has been the Inspector for Johnny K's for the past year and a half. He was advised of the noise complaints by a police officer, Sgt. Crawford. He is not aware of any charges ever being laid under the noise by-law. He indicated that the other patios on Queen Street East generally have an 11 p.m. closing time.

On behalf of the Applicant, the first witness called was Paul Livingstone, a resident of the Beaches area and a regular patron of Jonnny K's Restaurant. He and his wife have dined there regularly since it opened in 1982. He describes as an intimate, well-run dining spot. The only sounds he's aware of on the patio, where he often dines, is intimate chatter over a table. He has not seen any boisterous behaviour. He states that the staff and owners are frequent on the patio monitoring it.

The next witness was John Katsouras, the owner of the restaurant. He testified that the restaurant has 35 staff members. He has been operating the patio each summer since 1982 until 1:00 a.m. He testified that no complaints have ever been made directly to him. He is unaware of any police attendances resulting from noise complaints. He confirmed that there has not been any music on the patio since 1984.

The policy that he has established for the patio requires customers to have a minimum \$13.00 food order with liquor. He indicated that the patio has been regularly monitored for noise by the Metro Licensing Board and that the regulatory body has not found any substantiated noise complaint, although it held a hearing to review the Applicant business licence under the provisions of the Municipal Act. Mr. Katsouras also made the point that if the patio did not have a liquor licence, it would still be noisy. He stated that any noise arises as the result of outdoor dining, and not due to service of alcoholic beverages.

The Tribunal also had the benefit of hearing the evidence of Karl D. Jaffary, a barrister and former alderman. He outlined the attempts made by the City of Toronto to regulate restaurant uses that abut residential areas through holding and zoning by-law passed pursuant to the provisions of the Planning Act, and through enforcement by the Metro Licensing Commission of the regulations passed pursuant to the Municipal Act.

As counsel for the Board conceded, there was no evidence before the Tribunal of any breaches of the regulation made under the Act. The only issue before the Tribunal related to the complaint that noise from the patio disturbs some of the residents on Kenilworth Avenue.

As stated earlier in these Reasons for Decision, the Tribunal agrees with the Board's conclusion that this restaurant is a well-run dining establishment. There is no

vidence to suggest that sounds that emanate from the patio are the result of unruly, boisterous or drunken behaviour. The evidence of all the witnesses indicates that the sounds are those of people talking and having dinner. In particular, it is to be stressed that there is no evidence before the Tribunal of complaints which are directly linked to the service of average alcohol.

The purpose of the Act is to regulate the service of average alcohol, and the authority of the Board and of this Tribunal to consider the needs and wishes of the public, pursuant to Section 6(1)(g) of the Act, must be exercised in the context of the overall object and purpose of the Act.

As all of the witnesses have agreed, this Applicant enjoys the benefit of a legal non-conforming use status for his patio dining lounge. Section 34(9)(a) of the Planning Act protects the Applicant from the application of the zoning by-law passed in January 1987 which prohibits this type of use. Section 34(9)(a) of the Planning Act provides:

No by-law passed under this section applies,

- (a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose.

The Tribunal finds that the complaints regarding the patio stem from the fact that a residential use abuts a commercial restaurant use. There is nothing about the manner in which this restaurant sells or serves liquor which is creating a problem.

The Board was faced with a similar situation recently in the matter of Chrysalis Enterprises Ltd., Licensee of (the) Popa Tavern. In that case, the Board came to quite a different conclusion than it did in this instance and it is worthwhile to quote at length here from the Board's Reasons for Decision:

Indeed, the problem was described by both Councillor Kanter and the Licensee as a

"land use" or "planning" or "zoning" problem. The Board entirely agrees with that characterization and for that reason refused to hear evidence from planners with respect to the appropriate location or locations for such establishments. The Board is very strongly of the view that "land use" or "planning" or "zoning" problems are primarily within the bailiwick of municipal authority. Having said that, we wish to express clearly that we sympathize with the residents of the neighbourhood. There is no doubt that if we lived in that neighbourhood we would have the same complaints and suffer the same anxiety. However, we are acting not as free individual members of the community but as Members of the Liquor Licence Board and it is our duty to exercise only that jurisdiction which, in our view, the Liquor Licence Board has.

It is important to understand that the Liquor Licence Board does not authorize the operations of hotels, restaurants, dance halls, etc. The Liquor Licence Board merely authorizes the provision of an ancillary service - the serving of beveral alcohol in such establishments.

While it is true that the Board has very broad jurisdiction to impose terms and conditions on a licence, including the hours of service, those terms and conditions must relate directly to the provision of beverage alcohol and clearly do not extend to the authorization or prohibition of a particular type of business. It would be very difficult, for instance, to justify the Board ordering that a restaurant may not serve breakfast. We hold, therefore, that the Board is without jurisdiction to control the provision of entertainment, music or food and non-alcoholic beverages between the hours of 1:00 a.m. and 4:00 a.m. in a dining lounge. We note that the lounge is in fact cleared of patrons, as

required, after the 1:00 o'clock closing hour and that the complaints arise sometime after that, as was previously discussed.

Throughout that portion of the hearing which dealt with the public interest, there was a suggestion that the municipal licensing authority had refused to deal with the alleged problems and that accordingly the Liquor Licence Board must. A municipality cannot confer jurisdiction upon the Liquor Licence Board by abrogating its responsibilities/ authority over "land use", "planning" or "zoning" matters. Problems that can properly be characterized as "land use" problems are visited upon the municipal authority and not on the Liquor Licence Board.

The law is clear that a regulatory body or officer which exercises a discretion given to it under the statute creating such body, is limited to exercising that discretion in furtherance of the policy and objects of that statute. See Radfield v. Minister of Agriculture [1968] All E.R. 694, [House of Lords]; Re: Doctors Hospital and Minister of Health et al 2 O.R.(2d) 164, [Divisional Court]; and Brampton Jersey Enterprises Limited v. The Milk Control Board of Ontario [1956] O.R. 1, [Court of Appeal].

In conclusion, although the Tribunal sympathizes with the residents who find the sounds resulting from the patio operation disturbing, the Tribunal finds that it would be inappropriate and improper to use the discretion granted to it under the Liquor Licence Act to effect an indirect solution to that is, in essence, a land use problem.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby directs that the Decision of the Liquor Licence Board imposing the term and condition to the Applicant's Patio (Dining Lounge) Licence be set aside.

CHRIS KOSKINIOTIS
(ELM'S RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE .

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
KENNETH VAN HAMME, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

A. TOM KARVANIS, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 10 September 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Chris Koskiniotis, also known as Chrisi Koskiniotis, the Licensee of The Elm's Restaurant located at 1306 Bloor Street West, Toronto, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 16th day of January, 1986, suspending the dining lounge licence for a period of fourteen days and directing Demitrios Koskiniotis and Chrisi Koskiniotis to attend a training seminar.

The Liquor Licence Board issued a Notice of Proposal on the 9th day of October, 1985, to suspend the said licence pursuant to Section 10(3) of the Liquor Licence Act for a period of fourteen days on the grounds that the past conduct of the licence holder afforded reasonable grounds for belief that its business will not be carried on in accordance with law and further, that the licence holder is in breach of a "term and condition" of the liquor licence in that contrary to Section 8(4) of Regulation 581/80, the licence holder permitted drunkenness to take place on the licensed premises. The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 16th day of January, 1986. The Liquor Licence Board in its Decision suspended the dining lounge licence of the Licensee for a period of fourteen days and further directed Demitrios Koskiniotis and Chrisi Koskiniotis to attend a training seminar. The Licensee appealed that Decision to this Tribunal.

At the opening of these proceedings, counsel for the applicant brought a preliminary motion to revoke the Decision of the Liquor Licence Board on the grounds that the hearing before the Board was not proper in that the Notice of Proposal dated the 9th day of October, 1985 was issued to Chris Koskiniotis while the licence holder under the dining lounge licence number DL13593 issued on the 12th day of June, 1985 was issued to Chrisi Koskiniotis. Counsel submitted that the Liquor Licence Board's power to suspend pursuant to the provisions of Section 10(3) of the Act is subject to compliance with the provisions of Section 11 of the Act requiring it to serve its Notice of its Proposal, together with written reasons therefor on the Applicant or holder of the licence or permit affected. Counsel submitted that the Proposal, together with the written reasons were allegations made against Chris Koskiniotis and not against the Licensee. Counsel also objected on the grounds that the Notice of Proposal was framed as showing the Licensee to be in breach of Section 8(4) of Regulation 581/80 in that the Licensee permitted drunkenness to take place on the licensed premises while, in fact, the Licensee was not on the premises at the time the alleged occurrence took place, and that if there had been a breach of the regulations, it should have been an allegation of a breach under Section 8(15) of the said Regulation requiring every licensed premise to be under the management and supervision of a person who has experience in the food and beverage industry such that he is capable of managing an orderly and efficient operation.

Counsel for the Board referred the Tribunal to the request for a hearing filed as part of Exhibit 5, Record of proceedings, which request for hearing was signed by Chris Koskiniotis (the owner). Counsel also submitted that the Board had the right to request an amendment to the material filed in the proceedings in order to correct the name of the Licensee. Counsel also submitted that he was prepared to proceed on paragraph 4 only of the Notice of Proposal which specified that the licence holder did on December 15th, 1984 and on February 14th, 1985 permit liquor to be served to a person in an apparently intoxicated condition and that he would submit argument in the course of the hearing to that effect, that the Licensee is bound to comply with this subsection of the regulations, notwithstanding that the Licensee might not be personally present in the premises at the time of an alleged breach.

Counsel for the Applicant advised the Tribunal that he had no objection to the name of the Applicant being changed to

"Chrisi" and the Tribunal orders the necessary amendment to be made to the material filed. The Tribunal refused the preliminary objection and directed that the appeal proceed.

Counsel for the Applicant and the Board advised that they were in agreement on the following facts and that no evidence would be called with respect to these facts:

1. Intoxicated persons were served by someone on the premises on two occasions, namely December 15th, 1984 and February 8th, 1985.
2. Chrisi Koskiniotis, the Licensee, was not present on either occasion.
3. Demitrios Koskiniotis was present at the licensed premises on both occasions.
4. Demitrios Koskiniotis is a manager of the premises and not a Licensee.
5. A waitress employed by the Licensee was convicted in Provincial Court of the offence of permitting liquor to be sold to a person in an apparently intoxicated condition on December 15th, 1984.
6. Demitrios Koskiniotis was convicted in Provincial Court of the offence of permitting liquor to be sold to a person in an apparently intoxicated condition on February 8th, 1985.

It was agreed by counsel for the Applicant and the Board that the matter to be determined was a question of law and the hearing was, therefore, adjourned for submission of written argument by both counsel.

Counsel for the Liquor Licence Board submitted that although the licence holder, Chrisi Koskiniotis, was not in the licensed premises on the occasion of either offence, namely, December 15th, 1984, or February 8th, 1985, when liquor was sold and supplied to a person in an apparently intoxicated condition, she had delegated the management and control of the licensed premises to her husband, Demitrios Koskiniotis, and

Chrisi Koskiniotis as Licensee must bear the responsibility for the negligent acts of her employee manager in the course of his employment. Counsel referred to the unreported decision of the Supreme Court of Ontario in the case of Kazia v. Her Majesty the Queen released on July 5th, 1973, which is a case which dealt with the sale and service of liquor to underage patrons, but the principles of which are applicable in the present appeal. Chief Justice Evans stated as follows:

If the accused did not delegate to the doorman authority to check for entry and control of the people in the licensed premises but retained it, and one of the accused was on the premises on the night in question, then there was negligence on his part in failing to adequately supervise the checking by employees of the patrons who were coming into his licensed premises and, therefore, he would be liable. If on the other hand they did delegate authority to the doorman to check and the latter failed to check, then the doorman is at fault and that negligence, on the part of the doorman, must be imputed to the licence holder. It is not sufficient to provide a security system. There must be supervision of the system to make certain that it is operating effectively. Failure to provide such supervision is a failure to take reasonable care in the circumstances.

Counsel, therefore, argued that if Chrisi Koskiniotis did not delegate to her husband the authority to manage the licensed premises, then she was negligent in failing to adequately supervise the sale and service of liquor in the premises by her husband and her employees and is liable for the unlawful sale of liquor. If on the other hand she did delegate authority to her husband to manage the premises, then his failure to ensure that liquor was not sold to persons in an apparently intoxicated condition must be imputed to her.

Counsel for the Board also referred to the case of Egina v. Royal Canadian Legion (1971) 3 O.R. 148, which was a case where the licence holder had been charged for permitting drunkenness to take place in the licensed premises. The Court held that the licence holder was liable where, on the facts as

found, the person put in charge of the premises by the licence holder must have known that drunkenness did occur as alleged and the Court stated as follows:

At the outset this case must be distinguished on its facts from the case where the liability of the master is imputed simply because of acts of the servant in the course of his employment. Here, there was a complete delegation of the management and operation to the one person physically present in the premises. As was said by Lord Hodson in *Vane v. Yiannopoulos* (1964) 3 All E.R. 820, (1965) A.C. 486, this was a delegation to Podlodziński of the power to prevent drunkenness. The respondent having done so, and particularly since the licensee was a corporation which could act only through individuals, there must be imputed to it the same degree of culpability as would have been incurred by the delegate had he himself been the licensee.

Counsel for the Applicant submitted that the licence holder had not been convicted in respect of any of the alleged offences and that no liability can attach to the licence holder for the offence committed by the waitress, Christine John, on December 15th, 1984 in the absence of evidence that either the licence holder or a person in control of the premises at the time had knowledge of the commission of the prohibited act. Counsel referred to the case of *Regina v. Dovco Holdings Ltd.* (1977) 34 C.C.C. (2d) 317, where the Court acquitted the licence holder both of supplying liquor to a person in an apparently intoxicated condition and of permitting drunkenness. Counsel also submitted that the offence of permitting drunkenness to take place on the licensed premises is a "strict liability" offence and is not an absolute liability offence as referred to the case of *Regina v. City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353, wherein it was argued that an essential element of a strict liability offence is knowledge of the commission of a prohibited act by the licence holder or, the alternative, evidence that the licence holder is willfully ignoring the possibility of the commission of the offence and the prevention of same. Counsel argued that where no evidence is tendered to show that the licence holder is willfully ignoring the possibility of the commission of the offence and

the prevention of same and the evidence only supports a finding of knowledge or willful blindness by the manager of the licence holder, the appropriate section is Section 8(15) of Regulation 81/80. Counsel further argued that, in the alternative, permitting liquor to be served to a person in an apparently intoxicated condition does not necessarily establish that the licence holder permitted drunkenness to take place on the licensed premises.

After reviewing the facts as agreed to by counsel together with the submissions of counsel, the Tribunal finds that the Licensee has carried on activities that are contrary to the Liquor Licence Act and regulations in that she did on two occasions permit liquor to be served to a person in an apparently intoxicated condition contrary to Section 8(4) of regulation 581/80 of the Liquor Licence Act. The Tribunal accepts the argument that although the Licensee was not present on either occasion, she had delegated the management and control of the licensed premises to her husband, Demitrios Koskiniotis, and that she must bear the responsibility for the negligent acts of her husband as manager of the establishment. The cases of Kazia v. Her Majesty the Queen, Regina v. Royal Canadian Legion and Regina v. Dovco Holdings Ltd. all support the concept of the responsibility of the Licensee for the negligent acts of her employee. There was an acquittal in the case of Regina v. Dovco Holdings Ltd., but this was as a result of the fact that the manager of the premises, who was in charge of the premises at the time the offence was committed, was acquitted of the offence and that, therefore, the absent licence holder could not be convicted of an offence for which his manager had been acquitted. This is not the case in this appeal. Counsel for the Applicant has referred the Tribunal to the decision of the Supreme Court of Canada in the case of Regina v. City of Sault Ste. Marie, but Mr. Justice Dickson, in handing down the decision for the Court, stated that the correct approach, in his opinion, "is to relieve the Crown of the burden of proving mens rea, having regard to...the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence." At page 373 of the Judgment, he set out the categories of offences as follows:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution

either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

The Tribunal accepts the proposition that breaches of the Liquor Licence Act and its regulations fall into the second category whereby the Licensee has an opportunity to establish defence of reasonable care. However, the Licensee in this appeal has failed to establish such a defence and she must assume responsibility for the negligent acts of her employees.

With respect to the question of penalty, the Board proceeded only with respect to paragraph 4 of the Notice of Proposal and no evidence was tendered with respect to any other alleged offences. The Tribunal recognizes that there were two separate offences which occurred approximately two months apart and this justifies a suspension of the licence. However, the Tribunal is of the opinion that the period of suspension should be less than the fourteen day period as imposed by the Board.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal

hereby directs that the Decision of the Liquor Licence Board dated the 16th day of January, 1986, be varied to provide for a suspension of the dining lounge licence for a period of seven days and the Board is authorized to set the effective date for the commencement of the said suspension. In all other respects the Tribunal confirms the Decision of the Board.

JOHN PETERS

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING ROOM LICENCE

IN RE: SANDRA J. SNAKE
(SANDI'S PLACE RESTAURANT)

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
BARBARA J. SHAND, Member
ROBERT COWAN, Member

APPEARANCES:

JOHN PETERS, appearing on his own behalf

WILLIAM HENDERSON, representing Sandra J. Snake

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF 8 August 1984

HEARING: 9 January 1985

Thamseville

REASONS FOR DECISION AND ORDER

This is an appeal by John Peters from the Decision of the Liquor Licence Board of Ontario dated the 2nd day of February, 1984, wherein the Board approved the application of Sandra J. Snake for a Dining Room Licence in respect of Sandi's Place Restaurant in Bothwell, Ontario.

The Applicant had applied to the Liquor Licence Board for a Dining Room Licence on the 23rd day of August, 1983, and the Board issued a Notice of Proposal to refuse to issue the said licence on the 3rd day of November, 1983. The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 2nd day of February, 1984, at which time the Board approved the application for a Dining Room Licence but reserved its decision with respect to the application made for a Patio Dining Room Licence. Mr. Peters has appealed the Decision of the Board granting the said licence.

Prior to the appeal proceeding, this Tribunal held a meeting on the 25th day of July, 1984 and the purpose of the meeting was to enable the Tribunal to determine its jurisdiction to proceed with the appeal. Several matters were raised at the meeting which were as follows:

- (a) Does John Peters have the necessary standing to require a hearing pursuant to Section 14(1) of the Act?
- (b) Does Mr. Peters have a valid objection as to the constitutionality of the Liquor Licence Act in view of the fact that the proposed licence is to be located within the limits of an Indian reserve?
- (c) Is the Moravian Indian Reserve a municipality as defined in Section 6(1)(g) of the Act?

At this meeting of the Tribunal, John Peters was represented by counsel and by minutes of agreement entered into between the parties to the proceedings, the jurisdictional matters were settled as follows:

- (a) John Peters was deemed to be a party to the proceedings and was a person having standing to require a hearing pursuant to Section 14(1) of the Act.
- (b) Mr. Peters' objection as to the constitutionality of the Liquor Licence Act as it applied to the Moravian Indian Reserve was withdrawn.
- (c) The query as to whether an Indian Reserve is, or is within a municipality for the purposes of Section 6(1)(g) of the Liquor Licence Act was withdrawn.

It was agreed that the appeal would proceed in the usual manner.

At the commencement of the appeal on the 8th day of August, 1984, the Tribunal was advised that the parties had agreed to adjourn the appeal in accordance with Minutes of Settlement filed with the Tribunal which provided for a referendum to be held for the residents of the Moravian Indian Reserve, submitting the following questions to such residents:

Are you in favour of the sale of spirits,
beer and wine for consumption on premises
where food is available at Moravian Indian
Reserve?

The Minutes of Settlement further provided that upon report that a referendum had been held within 21 days of the date of the Minutes of Settlement, the Tribunal would reconvene to hear evidence as to the conduct and results of that referendum and such further evidence as the parties may wish to lead.

It appears that a referendum was held on August 15th, 1984, but Mr. Peters objected to the results of the referendum on the grounds that the wording on the ballot was not the same as the wording which had been agreed upon in the Minutes of Settlement and on the grounds that the referendum was not held in accordance with the referendum regulations of the Indian Act. The actual wording on the ballot was as follows:

Are you in favour of a licensed liquor
establishment (tavern, restaurant, bar,
lounge, etc.) on the Moravian Indian
Reserve, for the sale of spirits, beer and
wine for consumption on premises?

The Tribunal, therefore, directed that the appeal should proceed on its merits at the Moravian Indian Reserve on January 9th, 1985.

John Peters gave evidence on his own behalf and objected to the issuance of a liquor licence on several grounds. He firstly objected to the location of the restaurant as it was across the road from the recreation area. He stated that there was no proper police protection within the Moravian Indian Reserve and that the existence of licensed premises on the Reserve without adequate police protection would create many problems for the Indian Band. He also objected to the issuance of a licence on the grounds that there had been no proper referendum under existing Provincial Legislation

requiring a 60 per cent vote by the residents in favour of a liquor licence before any premises in the municipality could be licensed. He stated that the Moravian Indian Reserve was in a high unemployment area and that liquor is the enemy of the residents of the Reserve. He argued that a liquor outlet in the middle of a small Reserve is very bad. Mr. Peters acknowledged that the Band Council had made application for a proclamation by the Governor in Council which was issued and declared that Section 94 of the Indian Act does not apply to the Moravian Indian Reserve and that, as a result, the prohibitions contained in Section 94 of the Indian Act with respect to the sale of liquor on a Reserve do not apply in this particular case.

On cross-examination, Mr. Peters acknowledged that the situation with respect to police protection had changed in that there was now a police officer located on the Reserve and that there was local police protection available. He also acknowledged that he was a party to the Minutes of Settlement on August 8th, 1984, and that he had had an opportunity to consult with a solicitor at that time.

The next witness called by Mr. Peters was Gloria Conefish, a theological student, who is a member of the Reserve but presently lives in Chatham. She expressed the opinion that there should be no liquor on any Indian Reserve and that it was merely a source of trouble. On cross-examination, she was not sure whether she had voted in the referendum.

The final witness called on behalf of the Applicant was Margaret Peters, the wife of the Applicant. She stated that there was presently too much drinking on the Reserve and that the establishment of licensed premises would expose the residents of the Reserve to the opportunity for an additional source of liquor. She stated that she did not believe that the establishment of licensed premises would eliminate bootlegging.

The first witness called by counsel for the Applicant was Donald Stead, Superintendent of Reserves and Trusts of the Department of Indian Affairs who was based in London and his territory included the Moravian Indian Reserve. He had held his position since March of 1981. Mr. Stead stated that he had been requested to attend to supervise the vote on the liquor question held on August 15th, 1984, and that he was there in the capacity of a witness only. He stated that he was concerned with the form of a referendum under the Indian Act, but confirmed that many Indian Bands often use Band custom and

call on him as a witness to act as an unofficial scrutineer. He identified the ballot which was introduced as evidence and confirmed that he participated in the count of the result. He stated that 98 people cast a ballot on the question and that 6 people were in favour of premises licensed under the Liquor Licence Act while 36 people were opposed. He confirmed that the vote held on August 15th, 1984 was not an official referendum under the provisions of the Indian Act and did not comply with many of the requirements.

On cross-examination by counsel for the Liquor Licence Board, Mr. Stead confirmed that the Order-in-Council issued on September 30th, 1959, permitted the possession of alcohol on the Indian Reserve and that the proclamation dated August 12th, 1983, declared that Section 94 of the Indian Act shall not apply to Moravian Reserve No. 47 in the Province of Ontario and that this had the effect of bringing the Reserve within the guidelines of the Ontario Liquor Licence Act. He confirmed that this proclamation was issued at the request of the Band Council, but that this does not necessarily mean that the majority of the members of the Reserve are in favour of the sale of liquor.

The next witness called was the Applicant, Sandra J. Snake, and she gave evidence as to the history of her establishment. She stated that she had attended St. Clair College and obtained a diploma in food management. She stated that she had originally approached the Liquor Licence Board with respect to an application for a Dining Room Licence, but was advised that before any application could be proceeded with, it would be necessary to obtain a proclamation from the Governor in Council proclaiming that Section 94 of the Indian Act which prohibited the sale of liquor on an Indian Reserve did not apply to the Moravian Reserve No. 47. She stated that her original application for the issuance of this proclamation was made in 1980. Mrs. Snake testified that she had been advised by the Liquor Licence Inspector of the changes required to be made to her premises which was a converted house trailer with seating for 36 customers. Mrs. Snake also referred to the Record of Proceedings before the Liquor Licence Board and, in particular, pages 45 to 48, inclusive, of that Record which included letters of support, together with a petition of persons in support of her application for a licence. She stated that 49 of the signatures on the petition are members of the Moravian Reserve No. 47.

Counsel for the Applicant called one further witness, Andy Jacobs, who testified in support of the application for the licence. He felt that it was of benefit to the residents of the Reserve to be able to be within walking distance of a licensed establishment. He stated that, in his opinion, this would reduce the possibility of impaired driving offences, especially with younger people, and that the consumption of alcohol in legal premises would eliminate illegal drinking. He stated that the existence of a police officer on the Reserve had improved the situation greatly.

The next witness before the Tribunal was James F. McGuigan, the member of the Provincial Legislature and he urged the Tribunal to take every step required to ensure that any liquor licence for the area would be properly issued. He supported the principle that the minority should always be heard and that the responsibility for self-government be passed to the Indian people as quickly as possible.

In argument, Mr. Peters stated that he was opposed to the issuance of any liquor licence on a small Indian Reserve. He stated that the Moravian Reserve No. 47 was originally settled in 1792 as a Christian Reserve and that it was a self-supporting farm community prior to World War II. He stated that it was not up to him to say "no" or the Liquor Licence Board to "yes" to an application for a liquor licence, but that there should be a referendum pursuant to the provisions of Section 26 of the Liquor Licence Act and that without such a referendum, the issuance of a licence is invalid. Mr. Peters argued that if this was a test case and that if new ground is being broken, all concerned should ensure that it is being broken properly. He argued that the only way that this could be done would be to determine the results of a referendum under the provisions of Section 26 of the Liquor Licence Act.

Counsel for the Applicant reviewed the many controversial issues arising from this application and which resulted in this appeal. He stated that the licence was issued on February 4th, 1934, and he reviewed the Minutes of Settlement entered into between the parties at the commencement of the proceedings before this Tribunal. He confirmed that a vote had been taken and that although the question on the ballot was not precisely the same as contained in the Minutes of Settlement, there was no real change in the effect of the question as a result of the change in wording. He argued that the results of the vote are before the Tribunal and that a substantial majority of the people who voted were in favour of

the issuance of a licence to the Applicant. He argued that the Applicant is a capable business woman who had obtained proper financing and had followed all steps required from any prospective licensee. Counsel reviewed the evidence of community support and the people had had an opportunity to speak. He stated that the Applicant wished to operate her business under a provincial regulatory scheme and stressed the importance to have legal outlets available for the sale of liquor.

Counsel argued that Section 26 of the Liquor Licence Act with respect to a referendum was not applicable in that the effect of the 1983 proclamation under the Indian Act was to permit the sale of liquor on the Reserve in accordance with provincial regulations. He argued that when the proclamation was issued the applicable federal laws with respect to the sale of liquor were withdrawn and the provincial laws then applied.

Counsel for the Liquor Licence Board argued that the matter to be determined on the appeal was whether the Applicant was entitled to a licence having regard to the provisions of Section 6(1)(g) of the Liquor Licence Act which provides that an Applicant for a licence is entitled to be issued the licence except where the issuance of the licence is not in the public interest, having regard to the needs and wishes of the public in the municipality in which the premises is located. For the purposes of this Section, it had been previously agreed that the Moravian Indian Reserve No. 47 is a municipality and counsel for the Board argued that the onus is on Mr. Peters to show that the issuance of the licence is not in the public interest, having regard to the needs and wishes of the public. He argued that the onus had not been satisfied and that the evidence before the Tribunal clearly showed that the needs and wishes of the members of the Reserve were to have the licence issued. He, however, submitted to the Tribunal that if the licence is granted, a term and condition be attached that the hours of operation for the premises not be changed without there being a public hearing under the provisions of the Liquor Licence Act.

The first matter to be considered by the Tribunal is the definition of the word "municipality" in Section 6(1)(g) of the Liquor Licence Act. There are two possible approaches to the interpretation. The first is to interpret the word in the limited manner in which it is defined in Section 1 of the Act which would limit a municipality to a city, town, village or township. The alternative is to interpret the word "municipality" as meaning an area rather than a specific

orporate entity. The Tribunal has taken the view that the latter interpretation is consistent with the intention of the statute and that if a Reserve is located within the territorial limits of a municipality, the public is the public in the municipality including the residents of the Reserve.

The second matter to be considered by the Tribunal is whether Sections 25 and 26 of the Liquor Licence Act apply in this appeal. Prior to 1983, the sale of liquor was prohibited by virtue of the provisions of Section 94 of the Indian Act, R.S.C. 1970, but the Governor in Council issued a proclamation pursuant to Section 4(2) of the Indian Act which declared that Section 94 of the Act no longer applies to the Moravian Indian Reserve. After reviewing the material and arguments submitted on this point, the Tribunal finds that Sections 25 and 26 of the Liquor Licence Act do not apply in that the Moravian Indian Reserve is not a municipality within the meaning of the two sections and that the electors of the Reserve are not electors for the purposes of Section 26. The Tribunal further finds that the Moravian Indian Reserve is not part of the municipal corporation of the Township of Orford. The Tribunal finds that when the Governor in Council issued the proclamation removing the prohibitions under Section 94 of the Indian Act, the applicable federal laws with respect to the sale of liquor were withdrawn and that provincial law with respect to the regulation of the sale of liquor would then apply. Any other finding would create a vacuum which would result in there being no legislation, regulation or control on the sale of liquor within an Indian Reserve. The Tribunal, therefore, finds that it is entitled to deal with the application on its merits pursuant to the provisions of Section 6(1)(g) of the Liquor Licence Act.

In accordance with the original Minutes of Settlement, a referendum was held for the residents of the Reserve which resulted in the majority of the persons casting ballots voting in favour of the sale of spirits, beer and wine in licensed liquor establishments within the limits of the Reserve. Mr. Peters had objected to the wording in that the question on the ballot was not exactly the same as the question to be submitted in accordance with the Minutes of Settlement, but the Tribunal finds that there is no substantial difference between the meaning of the question as set out in the Minutes of Settlement and the question actually submitted to the residents on the ballot. There were 62 persons who voted in favour of the question and 36 persons who were opposed to the question and although the vote was not an official referendum under the provisions of the Indian Act, the Tribunal is satisfied that

the result of the vote represents the opinion of the majority with respect to the sale of liquor in properly licensed establishments. The Tribunal also has before it the evidence submitted by the Applicant and filed in the original proceedings before the Liquor Licence Board, including letters of support, together with a petition in support of the issuance of the licence signed by 49 members of the Moravian Indian Reserve No. 47. The only opposition with respect to the question of "needs and wishes" was the evidence of Mr. Peters and his wife and one other witness who opposed liquor on any Indian Reserve as it was merely a source of trouble. The Tribunal, therefore, finds that the issuance of the said Dining Room Licence is in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Accordingly by virtue of Section 14(3) of the Liquor Licence Act, the Tribunal confirms the Decision of the Liquor Licence Board dated the 2nd day of February, 1984, and authorizes the Board to issue a Dining Room Licence to the Applicant when the requirements of the Board have been fulfilled, subject to a term and condition being attached to the licence that the hours of operation for the premises be not changed without there being a public hearing under the provisions of the Liquor Licence Act.

ASILIOS SAKOULIDIS
 EMETRIOS KORRES and
 CHANASSIOS RAPPOS
 (WHITE TOWER RESTAURANT)

APPEAL FROM A DECISION OF THE
 LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

RIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
 BARBARA NICHOLS, Member
 NEIL E. VOSBURGH, Member

PEARANCES:

DAVID J.M. RENDEIRO, representing the Applicants

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
 HEARING: 17 March 1987

Toronto

REASONS FOR DECISION AND ORDER

The basic facts in this appeal are relatively straightforward. In September 1984, the three Applicants Messrs. Sakoulidis, (incorrectly described in the Decision of the Liquor Licence Board as Sakoukidis), Korres and Rappos, as partners, purchased the White Tower Restaurant. They hold a Dining Lounge Licence under the Liquor Licence Act for the premises which consist of five rooms: three on the main floor and two in the basement. This was the Applicant's first experience with licensed premises although they had been in partnership earlier in another type of business.

On April 20th, 1985, at about 11:00 p.m., in a routine check, two police officers in plainclothes found what in their opinion was service of liquor to minors and to persons who were in an intoxicated condition. Subsequently, three charges were laid against the partnership, White Tower Restaurant, - selling liquor to an intoxicated person, permitting drunkenness on licensed premises, and selling liquor to minors, all contrary to the Liquor Licence Act. The Applicants pleaded guilty to the first two charges and the third charge of selling liquor to minors was dropped. The partnership was fined \$300 on each charge.

As a consequence of this incident on April 20th and the charges and convictions, the Liquor Licence Board proposed to suspend the Dining Lounge Licence for 14 days because "the past conduct of the licence holders affords reasonable grounds for belief that their business will not be carried on in accordance with law, honesty and integrity in that...the licensees did sell liquor to persons in an apparently intoxicated condition and...fialed (sic) to ensure that the evidence (sic) as to the age of persons apparently under the age of 19 years was obtained prior to serving liquor to them".

Following a hearing, the Liquor Licence Board by Decision and Order dated August 26th, 1986, ordered that the Dining Lounge Licence of the White Tower Restaurant be suspended for four days only. In addition, the Board directed the Applicants to attend the training seminar offered by the Board.

It is the suspension that is being appealed by the Applicants. They have already attended the seminar.

Constable Donald Wrigglesworth gave evidence as to the events leading up to the charges under the Liquor Licence Act. Mr. Sakoulidis testified as to the operation of the licensed premises both before and after the events of April 20th, 1985.

On the evening in question, a Mr. Rabdis, had leased the basement facilities for what the Applicants understood was to be a stag party. Under the arrangement with Rabdis, the rental fee was \$250 with the Licensees running the bar and keeping the profits from the sale of liquor and beer. Rabdis retained the profits from the sale of tickets which were required to gain entrance to the party.

As it turned out, the party was a "youth" party, attended by young persons of both sexes. Mr. Sakoulidis said that he remained in the premises until 10:30 p.m. During that period, identification cards with the holder's picture on it had to be produced before liquor or beer would be served to the individual if the individual appeared under age. This was the standard practice of this business. Mr. Sakoulidis could not account for the fact that minors were evidently found to be drinking and to be intoxicated. He speculated that perhaps beer and liquor had been brought to the premises by those attending the party.

Constable Wigglesworth did not see anyone who appeared to be underage actually being served. The one individual whom he did see being served did not appear to be a minor, although in fact he was. His evidence was that in his opinion there were minors present and that there were a number of persons who were intoxicated. He personally did not carry out the age check. He was also not aware whether identification cards were requested by the Licensees.

Prior to this incident, the basement facilities had been leased periodically under arrangements similar to those described above. Now the facilities are leased for weddings, community dances, banquets and so on with the lessee obtaining Special Occasion Permit. 'Youth parties' are not allowed.

According to Mr. Sakoulidis, there had been no problems or warnings from the Liquor Licence Board before the April incident and no subsequent problems on the premises. Mr. Sakoulidis admits that he and his partners made a mistake and believe that, with the experience gained and changes instituted, infractions are unlikely to occur in the future.

In his summation, Mr. Grannum pointed out that although there was only one incident, many persons were involved - eight persons had been charged as minors and three or being intoxicated. Based on these numbers, he submitted that the Liquor Licence Board's conclusion was reasonable and that its Decision should be upheld since no evidence had been presented which supported interference with it.

Mr. Rendeiro, while not disputing the basic facts, pointed to a number of what he submitted were mitigating factors. He noted that the three Applicants had been in business together for a long time before buying the restaurant and that they had never had any problems with the law in that period. He said the Applicants were not experienced in operating licensed premises at the time the incident took place, but that since then they had learned and had taken steps to insure that no further breaches of the sort complained of would occur in the future. He also pointed out that the Applicants had fully co-operated with the police both at the time the infractions took place and during the prosecution for those infractions. Mr. Rendeiro argued that since his clients had already been prosecuted and fined in the Provincial Courts for the offences, to impose a further penalty with reference to the same offences would place his clients in double jeopardy and would be contrary to the Charter of Rights.

He submitted that the imposition of a suspension, which would be very costly to his clients, was not needed to insure that no future breaches of the Act would occur because the necessary steps had already been taken by his clients in this regard, and had, over a two year period, proven to be effective. He suggested, however, that if this Tribunal found that a suspension was warranted, then it should be for only one day, that day being a Sunday.

In its Reasons for Judgement, the Liquor Licence Board stated in part:

The service of alcohol to underage persons and indeed to intoxicated persons is a most serious violation of a Licence Holders' responsibilities. In our view it requires a period of suspension. The liquor inspector spoke well of the establishment. The police officers stated that the Licensees were most co-operative. Accordingly, we feel a shorter period of suspension is appropriate.

This Tribunal does not disagree with the sentiments expressed by that Board, however, under Section 10(3) of the Act, the Board may suspend a licence only if there are reasonable grounds for belief that the Licensee will not carry on business in the future, in accordance with law and with integrity and honesty. A suspension under Section 10(3) cannot be imposed as a penalty for a past breach of the Act unless that breach can sustain or provide reasonable grounds for belief that in future the Licensee will not act with honesty and integrity and will not comply with the law in operating his business.

In reviewing earlier decisions of the Tribunal on similar facts, this Tribunal found two decisions of the Liquor Licence Appeal Tribunal to be of assistance in its deliberations - Pioneer Hotel, 1982, 6 LLAT, 57 and Oasis Steeple House, 1977, 1 LLAT, 83.

At page 64 of the Pioneer decision, LLAT stated:

...It is the Tribunal's view that the section is clear in its requirements and that if a person entering the establishment is apparently under the age of 19 years of age in the opinion of the licensee or the person to whom the licensee has delegated that responsibility, then the licensee or its agents, employees or other representatives must ensure that evidence is obtained from that person satisfactory to the licence holder that the person is in fact 19 years of age. Obviously if the identification produced does not satisfy the licensee the person should not be admitted to the premises.

By the very wording of the Regulation, it is apparent that an opinion must be formed by the person charged with that responsibility. It is the view of the Tribunal that the section was not meant to imply absolute liability in the event an error is made in the formation of that opinion, and further, the very words indicate that the Legislature for the Province of Ontario did not expect a licensee to be infallible. In other words, it is necessary that an opinion be formed and one must instead examine the circumstances under which such an opinion is formed and the steps which a licensee took to prevent error, carelessness or recklessness in the formation of that opinion in admitting persons under the age of 19 years to the establishment.

This Tribunal believes that the views expressed still hold true. On the evidence before it in this case, the Tribunal is not convinced that the Licensees acted carelessly or recklessly in serving individuals who were found to be minors. Nevertheless, the Tribunal is satisfied that infractions were committed during the evening of April 20th. Do these breaches of the Act occurring in the course of an evening support the imposition of a suspension under Section 10(3) of the Act. In the Tribunal's opinion, they do not.

This Tribunal notes with approval the reasoning in the Oasis decision, particularly at page 86 wherein LLAT states:

The issue before the Tribunal is whether the penalty of a suspension should in fact be imposed. Counsel for the Board pointed out that under the Act, 2 forms of penalty were set out by the legislators - that following a conviction under the Act, and that which the Board is enabled to impose; and that the 2 actions are unrelated and can be applied independently. The Tribunal agrees.

Counsel for the Board made reference to the necessity for the imposition of the penalty of suspension as a deterrent both to the licensee and to others. The supplying of liquor to minors is a very serious matter; in the ordinary course a penalty should follow the breach of that section of the Act. However, the Tribunal is of the opinion that the occasion of a single incident, indeed an incident that appears to be an aberration, is not one appropriate for utilization for deterrent effects.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Order of the Liquor Licence Board of Ontario dated the 26th day of August, 1986.

SANS SOUCI AND COPPERHEAD ASSOCIATION

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING ROOM LICENCE

RE:
LOGOS INVESTMENTS LIMITED
(MIDWAY RESTAURANT)

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES:
C.J. TZEKAS, representing the Applicant,
Sans Souci and Copperhead Association

MICHAEL M. LERNER, representing
Logos Investments Limited

S.A. GRANNUM, representing the Liquor Licence Board

DATES OF 18 July 1986 Parry Sound
HEARING: 22 January 1987 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Sans Souci and Copperhead Association from the Order of the Liquor Licence Board of Ontario dated the 24th day of April, 1986, whereby an application for a Dining Room Licence for the premises known as Midway Restaurant on Frying Pan Island, in the Township of the Archipelago, was granted.

The application for the Dining Room Licence was made by Logos Investments Limited on the 15th day of May, 1985 and, after a public meeting held on July 25th, 1985, the Liquor Licence Board issued a Notice of Proposal to refuse to issue a liquor licence to Logos Investments Limited. A formal hearing was requested before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 24th day of April, 1986, at which time the Liquor Licence Board approved the application for the Dining Room Licence. That Decision is the subject of this appeal.

Counsel for the Applicant called Professor John Wilson as his first witness. Mr. Wilson is a permanent resident of the City of Waterloo, but owns a cottage on Crane Lake and was a former Councillor of the Township of the Archipelago. He was involved in the preparation of the zoning by-law and the official plan for the Township. He stated that the Township of the Archipelago is a section of the 30,000 Islands and that the predominant land use is recreational. Frying Pan Island is on the main small-craft channel through the 30,000 Islands and access is only by boat either from Parry Sound or from Twelve Mile Bay, a distance of approximately 16 miles in either direction. The witness stated that Sans Souci and Copperhead Association is an Association of property owners covering approximately the south-half of the Township of the Archipelago and there are approximately 700 cottages within the area of the Association. The witness stated that the area is policed by the Ontario Provincial Police, but that very little policing is provided because of the distances involved. Furthermore, the police will not answer any calls after sunset for any reason because of the difficulty in reaching the area. The Township was an unorganized area prior to 1980 and the Residents' Association was the body that provided certain municipal services to the area. Mr. Wilson stated that the Township was organized in 1980 in order to develop a formal official plan, which official plan has now been approved. He stated that the philosophy of the official plan with respect to existing commercial uses was to protect them but to retain their identity as being consistent with the recreational area. He stated that an official plan amendment would be required if there was a change in use.

The witness stated that he was personally opposed to the application for the granting of a Dining Room Licence to Midway Restaurant and cited the problems of navigation in the area. He stated that navigation is extremely difficult and that because of the problems of navigation, good seamanship is required at all times to travel in the area. The witness was of the opinion that the easy availability of liquor would compound the problems of navigation. He stated that night navigation is very difficult and that not all of the buoys in the small-craft channel were lighted.

On cross-examination, the witness confirmed that he had been cottaging in the area for the past 15 years and that his family has owned land in the area for over 60 years. He stated that there were approximately 30 households, consisting of about 100 permanent residents in the municipality and that

they are concentrated mainly in the Frying Pan Island area. The witness confirmed that the area from north to south covered a distance of approximately 32 miles and that any boater venturing off the main small-craft channel would need local knowledge in order to navigate at any time. The witness stated that he was familiar with the Midway Restaurant, but that he had not been to the restaurant and had no knowledge of the services provided by Midway Restaurant to boaters in the area such as laundry and showers. He stated that there were three or four other commercial establishments in the area and that there was one other licensed restaurant within the area represented by the Association. He stated that this restaurant was called Henry's Fish Restaurant and was located on Frying Pan Island about 500 yards from the Midway Restaurant and was operated as a restaurant only. The witness stated that the purpose of the official plan was to protect the viability of businesses within the Township and not to disturb the status quo of any commercial operations. The witness stated that the restaurant was in existence at the time of the preparation and implementation of the official plan and that the expansion of the existing use to permit a Dining Room Licence for the restaurant would not require an amendment to the official plan.

The witness was shown a copy of the Minutes of the Planning Committee of the Township of the Archipelago which approved the application for the Dining Room Licence. The witness stated that even though he recognized that the licensed premises must comply with the Liquor Licence Act and the Regulations of the Act, the area of the Township of the Archipelago is unique and that it is essential to have full faculties to properly navigate small craft on the water at all times. The witness confirmed that the Sans Souci and Copperhead Association operated docks on Frying Pan Island adjacent to the Midway Restaurant, but that they were not usable at the present time because of the high water in the area.

On re-examination, the witness confirmed Exhibit 11 in the proceedings before the Liquor Licence Board, which Exhibit was a certified copy of a Resolution of the Council of the Corporation of the Township of the Archipelago authorizing the chief administrative officer of the municipality to advise the Liquor Licence Board that the proprietor of the Midway Restaurant had failed to comply with municipal directives in the past and that the municipality was, therefore, not in a position to support its application for a liquor licence.

The next witness called on behalf of the Applicant was John Alexander Boyd, a permanent resident of Toronto, who is the owner of a summer home on Goodshine Island approximately seven miles north of Frying Pan Island. Mr. Boyd is Past President of the Sans Souci and Copperhead Association and is presently a member of the Executive. His family has owned this island since 1881 and the witness stated that he had been involved in the Association for approximately 15 years. The witness stated that there were between 300 and 400 members who belonged to the Sans Souci and Copperhead Association and the witness referred the Tribunal to an Exhibit filed in the proceedings before the Liquor Licence Board which was a copy of a Resolution of the Board of Directors of the Sans Souci and Copperhead Association dated April 24th, 1986, reaffirming its opposition to the application for the liquor licence for the Midway Restaurant. The witness stated that the Association opposes the granting of any liquor licences to establishments which have access by water only and that they would like to see the present licence issued to Henry's Fish Restaurant revoked so as to conform with the Association policy. He stated that he was not aware of any other licensed establishments within the area served by the Association.

On cross-examination, the witness confirmed that he had not been to Henry's Fish Restaurant for dinner and was not aware that there had been a recent extension to the liquor licence for Henry's Fish Restaurant which granted that establishment a Dining Lounge Licence and was apparently unopposed. The witness stated that he made no use of any of the services offered by the Midway Restaurant. He stated that the prime use of the area is recreational and that times have changed very drastically in recent years with more people having boats. He stated that this creates a real problem for control, and that boat traffic causes a huge increase in the temporary population of the area. The witness stated that police and other municipal services are not available in the same way as they would be in an urban area.

The next witness called on behalf of the Applicant was Dr. Trevor Ham who is a permanent resident of Toronto and practices medicine in the City of Toronto. Dr. Ham is the owner of two cottages in the Georgian Bay area: one being located one mile to the southwest of Frying Pan Island and the other cottage being located seven miles southwest of Frying Pan Island. Dr. Ham is a Director of Sans Souci and Copperhead Association and is the only doctor available to provide medical services within the area served by the

Association. He stated that there is no "on call" system within the area, but that he has a liaison with the Parry Sound hospital and will service accidents or other health problems. The witness stated that he has concerns in the event of a medical emergency in that there is no way to get medical help at night. He stated that people who travel the area at night are at risk as the nearest hospital is in Parry Sound.

On cross-examination, the witness referred to two boaters with medical problems who were intoxicated, but that he had no statistics with respect to boating accidents or whether they were alcohol related. He felt that the issuance of a liquor licence would attract more people from outlying areas such as Parry Sound, but would not attract local residents or boaters who have their own liquor supply. He confirmed that cottagers in the area who consume alcohol and use the waterways may also be a hazard, but that it was now popular to have a "designated boater" who would not consume alcohol. The witness stated that he would usually travel by canoe if he went to visit a friend for a drink or two. He felt that the location of the Midway Restaurant was the main problem in that it was located on the main small-boat channel through the 30,000 Islands and he compared it to having a tavern on a main access to Highway 401. The witness stated that he had no problem with moored boaters and that the problems were created by an abuse of alcohol. He confirmed that if both the patrons and operators acted properly, dangers would lessen. The witness stated that he had never been a customer of the Midway Restaurant including the store, marina and other services provided at the restaurant location.

The next witness called on behalf of the Applicant was Charles King, the President of the Sans Souci and Copperhead Association, who is owner of a cottage on an island west of Frying Pan Island and is a permanent resident of Toronto. Mr. King has been on the Board of Directors of the Association since 1972 and he confirmed that the Association's position has been to oppose all applications for liquor licences for premises restricted to water-based access. He stated that there was always a problem in obtaining knowledge of any applications for licences for new premises in that there were no newspapers other than the Parry Sound local paper which very few people in the Sans Souci area read. The witness stated that he only became aware of the expansion of the liquor licence for Henry's Fish Restaurant in May of 1986 and that the Association had written the Liquor Licence Board advising that they opposed

any transfer or renewal of the Henry's Fish Restaurant licence. The witness identified a petition of in excess of 200 names which was filed as an Exhibit and was a petition of families of members of the Sans Souci and Copperhead Association opposed to the Midway Restaurant application for a Dining Room Licence. The petition form had been sent out through a letter to the membership and the petitions had been returned by mail or delivered to the Executive at meetings of the Association. The witness confirmed that there was probably some duplication in the 200 names filed. The witness stated that the plans to establish a wilderness park within the 30,000 Island area were inconsistent with the granting of a liquor licence and he confirmed the problems of lack of access to police or other emergency services. The witness stated that the Ratepayers' Association owns property beside Midway Restaurant and that there is an 80-foot telephone tower located on the Association premises, together with a government dock, which has been operated since 1926. He stated that the Association had a meeting hall on adjoining leased premises.

On cross-examination, the witness stated that there would be approximately 400 families within the area of the Sans Souci and Copperhead Association and that the total summer population in this area would be in the neighbourhood of 1,000 persons. He confirmed that the petition of 200 persons would represent approximately 25 percent of the total membership. When asked whether the 75 percent of the persons within the Association who did not sign the petition were presumed to support the application for a liquor licence, the witness answered "yes". He stated that many members of the Association take the position that the Executive of the Association represent them and they rely on that without taking any active part. The witness stated that most people who are members of the Sans Souci and Copperhead Association own summer properties in the area and that a person may join the Association on application. However, the witness confirmed that Mr. Robert Kapit, the President of Logos Investments Limited and the operator of Midway Restaurant, had been refused membership in the Association. The witness stated that a successful regatta had been held at the Association property in the summer of 1986, and he acknowledged that some of the Association members had probably used the docking facilities of Midway Restaurant. The witness stated that he had never been to the Midway Restaurant or any of its associated facilities.

On re-examination, the witness stated that the application for membership submitted by Mr. Kapit had been refused because of existing litigation between Logos Investments Limited and the Sans Souci and Copperhead Association.

Three additional witnesses, who were not witnesses of the Applicant but were summer residents of the area, appeared in opposition to the application for the licence. They all confirmed that there was a substantial increase in boat traffic in the area which made it dangerous to canoe at night and that after dark, it was impossible to move off the main channel without getting into trouble. The witnesses confirmed that boaters and cottagers in the area also drink, but that they do not pose a problem. The cruisers are usually anchored at night and do not create any danger. The danger comes from customers of the restaurant leaving the premises after having consumed alcohol. None of the residents were aware of the services supplied at the Midway Restaurant and none of them had ever eaten there.

The first witness called on behalf of Logos Investments Limited was Robert Kapit who was the principal shareholder of the Corporation, and he advised the Tribunal that he had purchased the property in 1977 and had commenced business in 1979. The witness stated that he operates a "boatel" for pleasure craft boaters, together with docking and accessory facilities, a dining room, snack bar, marina, garbage disposal facilities and generally fulfills the needs of boaters travelling through the waterways. He stated that his customers are mainly transient boaters, but that anybody is entitled to use the facilities which are located on one of the main north-south channels through the 30,000 Island chain. The witness stated that there are no other facilities of similar type along the main channel route. He stated that prior to commencing business the only facilities at this location were the government docks. He stated that traffic has more than tripled in the last five years and that the Midway Restaurant is the first main stop for northbound boaters.

Mr. Kapit filed as an Exhibit a petition in support of the application for the Dining Room Licence containing several hundred signatures. He stated that these signatures were obtained from May of 1986 to October of 1986, and that the petition had been located on the restaurant counter during that period. He advised that patrons of the restaurant were invited to sign the petition. The witness

stated that the boaters moor in docks approximately 150 feet from the restaurant. He stated that in his opinion less than one percent of all pleasure boaters travel at night and would only travel a maximum of one and one-half miles to a recreational area in the vicinity. He stated that there are virtually no customers of the restaurant after dark in that most people do not travel on water at night.

The witness gave evidence as to the operation of the restaurant including the types of full course meals, together with particulars of the snack bar, gift store, general store and bakery operation, and that all operations were inspected and approved by local authorities. The witness testified that virtually all patrons of the restaurant were vacationers and that there were no transients going to or from work. Boaters travelling in the 30,000 Islands area were keenly aware of the dangers of bad weather, together with the need for good mooring facilities. The witness also described the types of boats mooring or arriving at the Midway Restaurant complex and stated that the cottagers usually have boats ranging between 14 feet and 22 feet while the transient boaters have cruisers having a length of from 24 feet to 60 feet with the average being between 30 feet and 40 feet. Most of the cruisers have overnight sleeping facilities but no showers and the witness stressed that his facilities were geared for transient boaters. He stated that he was not aware of any problems with respect to drunkenness in the area and that to his knowledge, there were no similar problems at Henry's Fish Restaurant.

On cross-examination, the witness confirmed that some of the signatories to the petition were from Parry Sound who probably came out to the restaurant to eat and return the same day. The witness stated that there is no motel or campground at his facilities and that 97 percent of the customers are boaters. He stated that there were no similar facilities for boaters north of the Midland-Penetang area. The witness stated that he had spoken to many cottagers who stated that they had no objection to the application for the Dining Room Licence, but that they would not oppose their own Association's objection to the licence.

Three additional witnesses were called by the Applicant in support of the application for the Dining Room Licence. All of the witnesses were boaters who reside in Barrie, Toronto and Markham respectively, and each of the witnesses testified that they were familiar with the Midway Restaurant and that it was the only place north of Port

Severn with all facilities for boaters. They stopped because of the good facilities including good docks, clean showers and good food. Two of the witnesses have been stopping regularly at Midway Restaurant over the last five to six years and the third witness over the last two years. They all confirmed that during the boating season, there is a great deal of boating traffic and Midway is not able to accommodate all of the boaters looking for boating facilities. All of the witnesses confirmed the excellent operation conducted by Mr. Kapit, including the quality of the food. They had knowledge of the nearby licensed premises known as Henry's Fish Restaurant and the witnesses confirmed that during the many times they had stopped at Midway, they had never seen any evidence of excess consumption of alcohol at Henry's.

Counsel for the Applicant submitted in argument that the real issue in this appeal is the application of Section 6(1)(g) of the Liquor Licence Act which provides that:

An applicant for a licence...is
entitled to be issued the licence...
except where,

(g) in the case of an application for a
licence, the issuance of the licence is
not in the public interest having regard
to the needs and wishes of the public in
the municipality in which the premises is
located.

Counsel argued that the Tribunal is faced with two different perspectives: the one being that of the cottagers and the other being that of the boaters, and the Tribunal has the problem of balancing the two perspectives. The facilities at the Midway Restaurant are presently being used by people who do not reside in the municipality. In this application, neither group are permanent residents of the municipality. Counsel referred to the case of Re: 481831 Ontario Limited (Cross Roads Tavern) (1984), 13 C.R.A.T., which at page 45 stated:

The Tribunal is not bound by the needs and wishes of those persons only who actually reside in the municipality where the licensed premises is located, but is entitled to go beyond the political boundaries of the municipality in order to determine the needs and wishes of the public in the community.

Counsel submitted, however, that boaters do not come within this category in that they are a very transient group who might only be docked at the Midway Restaurant one or two days per year and that the Tribunal must, therefore, give substantially greater weight to the seasonal residents who are residents of the municipality for the purpose of municipal taxation. Counsel also referred to the Tribunal's Decision in the appeal Re: 575547 Ontario Limited operating as Katie's Roadhouse Restaurant (1984), 14 C.R.A.T., at page 61 where the counsel for the Liquor Licence Board argued that the Tribunal must consider the expression of "needs and wishes" as being bona fide and that the people in the immediate area must be considered as being the most seriously affected. Counsel also referred to the appeal of Re: Christos Lampropoulos (Runnymede Village Restaurant) (1985), 14 C.R.A.T., at page 70 where it was argued that the ambit of public participation is limited to the needs and wishes of the public in the municipality in which the licensed premises is located. It is the position of the cottagers that their lifestyle will be affected by the issuance of a licence and that the boaters are not affected by the same problems. Counsel argued that in balancing the needs and wishes of the two groups the balance must be in favour of the seasonal residents. The boaters, in their evidence, stressed convenience but did not speak of need. Counsel pointed out that most boaters have their liquor on board their cruisers and that there is no need for licensed premises in the area. Counsel submitted that the area is overwhelmingly residential and that there are many successful lodge operations in this area without liquor licences of any kind.

Counsel for the Board referred in argument to the Decision of the Liquor Licence Board as set out in pages 22 to 25, inclusive, of the Record filed as an Exhibit with the Tribunal and argued that there was no new evidence presented in this appeal which would justify interfering with the Decision of the Liquor Licence Board.

Counsel for Logos Investments Limited in his argument referred to the preamble of Section 6 of the Liquor Licence Act which provides that an applicant for a licence is entitled to be issued the licence except where - and then deals with subsections (a) to (g) inclusive of Section 6(1). It was argued that the Applicant would be automatically granted a licence if it was not for the requirements of Section 6(1)(g). Counsel pointed out that the granting of a Dining Room Licence to the Midway Restaurant would not be an intrusion into a drinking area in that there are already licensed premises in the area.

no attempt was made by the Sans Souci and Copperhead Association to object to the extension of the liquor licence to Henry's Fish Restaurant. Counsel stated that it was not common that the ratepayers wished to preserve the status quo maintain the character of the neighborhood and he pointed out that neither the objectors nor the Applicant for the licence had attempted to call any permanent residents as witnesses. Counsel argued that it was a question of weighing the needs and wishes of the seasonal residents who would ordinarily be resident in the area for a maximum of two months a year as opposed to the interest of the many boaters who used the area for their recreation on an annual basis. Counsel submitted that the concept of the word "public" must be looked at and he also referred to the case of Re: 481831 Mario Limited (Cross Roads Tavern) (1984), 13 C.R.A.T. referred to above which stated that the Tribunal is entitled to go beyond the political boundaries of the municipality in order to determine the needs and wishes of the public in the community. Counsel submitted that boaters are members of the public and that this is a unique community with only 99 permanent residents. He pointed out that nowhere in the evidence was there any criticism of the service and the facilities provided by Mr. Kapit and that this was really a philosophical dispute between the cottagers and the boaters. Counsel stated that there was no evidence of any boating accident which occurred by reason of alcohol consumed at Henry's and that there was no evidence that Henry's Fish Restaurant had affected the quality of lifestyle within the community. Counsel submitted that the Decision of the Liquor Licence Board in authorizing the granting of the licence is a careful Decision which should not be upset.

After considering the evidence and arguments submitted by counsel, the Tribunal finds that there is not sufficient evidence to warrant the refusal of a Dining Room licence to the Midway Restaurant. No evidence has been called by the Applicant which would in any way criticize the current operations of the Midway Restaurant or that such operations presently have any detrimental affect to the neighbourhood. This is a unique situation in that neither the cottagers who make up the Association opposing the licence nor the boaters who are supporting the issuance of the licence are permanent residents of the municipality or community. It is true that each boater may only spend a few days in the area each season, but there are many boaters using the main channel through the 1000 Islands as access to their recreation each summer. The Tribunal is of the opinion that the wording used in any previous Decisions which might interpret Section 6(1)(g) of

the Liquor Licence Act do not restrict the right to include boaters as part of the public for the purposes of the said Section. Both groups are recreational groups of residents. Both groups have filed substantial petitions in support of and opposing the granting of the said licence, and counsel for both groups called several competent and sincere witnesses who either supported or opposed the application for the said licence. The Tribunal considers the evidence to be of virtually equal weight and takes the position that the onus is on the objectors to the licence to show that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public. The Tribunal finds that this onus has not been satisfied.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal confirms the Decision of the Liquor Licence Board of Ontario dated the 24th day of April, 1986, and directs the Board to issue the said Dining Room Licence when all other requirements of the Board have been satisfied.

678075 ONTARIO LIMITED
(ELM FLAMEBURGER)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE THE APPLICATION FOR A DINING ROOM LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
DENNIS J. EGAN, Member

APPEARANCES:

DAVID P. SMITH, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

SALLY BIRD, a Party, President of the
Huron-Sussex Residents' Organization

GINGERINA KISSELL, a Party

DATE OF HEARING: 14, 15 September 1987 Toronto

REASONS FOR DECISION AND ORDER

Pursuant to an application dated the 26th day of August, 1986, and filed with the Liquor Licence Board of Ontario, 678075 Ontario Limited applied for a dining room licence and a patio licence (for the sale of beer and wine only) for the Elm Flameburger situate at 338 Huron Street in Toronto. The hours of operation were to be 8:00 a.m. to 11:00 p.m., seven days a week. Subsequently, the application for a patio licence appears to have been withdrawn as the Liquor Licence Board, following a hearing into the matter, only dealt with the application for the dining room licence. By its decision dated April 23rd, 1987, the Board refused the licence on the basis that:

...the incursion of a licenced establishment into even the edge of this area is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

That Decision is now appealed to this Tribunal.

The background to the appeal is as follows:

On the evidence it appears that as early as 1952, restaurant was operated on the site of 338 Huron Street. The property, although it was expropriated by the University of Toronto, continued to be operated as a restaurant/diner off on to the present under a series of different proprietors. It is also clear that throughout this period, the premises have not been licensed under the Liquor Licence Act. The current managers, Gregory Lekas and Peter Eliou took over the family business in 1983.

338 Huron Street is geographically situate between two private residences, on the edge of, but within a small residential area adjacent to the University of Toronto, St. George Campus. On one side, there is less than one inch between the wall of the private home and the restaurant. As earlier noted, the property is owned by the University. From the material filed, it appears that many, if not the majority of the houses in the area are also owned by the University, are leased under fairly long term leases. The remainder of houses are owned privately. There are also several resident institutions such as a senior citizen's home in the area.

The community is stable with some families living in their homes for decades. The residents are a close-knit group and quite a number belong to the Huron-Sussex Residents' Organization, a corporation without share capital. One of the objects of this Corporation, which received its Letters Patent in 1970, is "to engage in political and citizen participation in whatever ways necessary and desirable in order to protect the cultural, social, property and political interests of the owners and residents of the neighbourhood."

In 1976 the area zoning was upgraded to R3Z3 to permit only residential and institutional uses. The restaurant at 338 Huron Street is, therefore, a legal non-conforming use and was tolerated as such by the residents in the area.

In August, 1986, the situation changed when a new lease for a five year term was negotiated with the University by Messrs. Lekas and Eliou. Under the terms of the new lease they obtained permission to sell beer and wine with food on premises provided that necessary licences were obtained. The two lessees thereupon applied for the necessary licenses and began extensive renovations to the premises. By the time the matter came before the Liquor Licence Board for a hearing, protest against the granting of the licence had been organized.

the community. The protest took the form of letters, petitions and viva voce representation to the Board. The protest proved to be successful and the Board refused to grant a licence.

The material filed with the Liquor Licence Board, both in support of and in opposition to the granting of the licence is also before this Tribunal. Additional material was filed. Furthermore, the Tribunal has for consideration the testimony of a number of witnesses, some in favour and some in opposition to the Applicants.

The residents, in their letters and testimony cited the present problems in their community of drunkenness, vandalism, rowdiness, noise and parking. They were very much concerned that even a limited dining room licence would greatly exacerbate these problems. In addition, and part of the problem is the perceived lack of prompt response by the local police when complaints are made to them. The residents were not prepared to accept the reassurances of the Applicant that the premises would not turn into a student pub. Based on their past experience, many of the residents expressed the view that the two individuals were not to be trusted in this regard, although there was no suggestion that the managers were incapable of operating a restaurant.

The opposition was not limited only to the residents, comprising of families, students and senior citizens, in the neighbourhood. For example, the Dean of Men at New College, the Dean of Women at the same College, teachers at the University, elected municipal representatives from the area, nearby residents' associations, church groups, and operators of licensed premises on campus united in opposition.

In favour of the licence were some residents of the area, students, teachers and workers at the University and nearby offices. They supported the Applicants because of the convenience of having licensed premises in the immediate neighbourhood where they could have a relatively inexpensive meal and enjoy a beer or wine with their food in pleasant surroundings. The University itself took no position on the issue.

Both those opposing and in favour of the licence commented on the improvements made by the Applicant not only to the building but to the quality of the food being served. It is the general consensus that the renovated restaurant was an asset to the community.

On the evidence before it, there appear to be numerous (one exhibit listed 69) licensed dining and pub-like premises both on and off campus within walking distance of 33 Huron Street. In some cases the premises on campus appear to be open only for special occasions, or for particular persons; however, it is clear that there are many licensed premises nearby which are open to all during regular hours.

In reaching its decision, the Tribunal has been guided by the following principles which have been enunciated from time to time in its previous decisions:

- the public must be aware that under the Liquor Licence Act, a person is entitled to a licence unless he becomes disentitled under any of the clauses (a) to (g) inclusive of Section 6(1) of the Act;
- since a person is entitled to a licence, the onus is on the objector to prove, on the balance of probability that, in this case, it is not in the public interest to issue it;
- the public interest must be determined in light of two aspects - (a) needs and (b) wishes;
- the issues of needs and wishes will not be decided solely on the basis of a head count;
- the concerns of the objectors must be bona fide; and
- the needs and wishes of the immediate residents will be given more weight than those of the transient trade.

Based on the total evidence before it, the Tribunal finds that the majority, but certainly not all of the residents in the area who made their views known, oppose the granting of a dining room licence. This majority does not represent any one narrow interest group, but is an expression of community concern. The Tribunal finds that the concerns are bona fide. The Tribunal is aware that the problems now existing will not be alleviated by refusal to grant the licence. The problems

re inherent in the neighbourhood, however, they may be exacerbated by granting a licence under the Act.

The Tribunal also finds that the needs of the neighbourhood can be readily met by the licensed premises already extant. In the Tribunal's opinion, the objectors in this case have proven, on the balance of probabilities, that it is not in the public interest to issue the licence applied for. In this, the Tribunal agrees with the conclusion and decision of the Liquor Licence Board.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of April, 1987, whereby it refused to issue a Dining Lounge Licence to the Applicant.

SUN-TRAC INVESTMENTS INC
(LE CONNAISSEUR TAVERN)

APPEAL FROM A DECISION AND ORDER
OF THE LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
WATSON W. EVANS, Member
RONALD W. CHEMIJ, Member

APPEARANCES:
FRANK MARROCCO, Q.C., representing the Applicant
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 6 March 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Sun-Trac Investments Inc., is the holder of a Dining Lounge Licence for the establishment known as the Le Connaisseur Tavern in Toronto and has operated the premises under that licence for some number of years.

On August 14th, 1986, the Liquor Licence Board issued a Notice of Proposal to "suspend for a period of seven days the dining lounge licence...because the past conduct of the officer and director of the corporation and employees thereof and to whom the management and operation of the premises has been delegated affords reasonable grounds for belief that the business of the sale and service of liquor will not be carried on in accordance with law".

A hearing by the Liquor Licence Board was held and the Applicant's Dining Lounge Licence was suspended by the Board for a lesser period of three days. The Applicant filed an appeal from that Decision to this Tribunal. Pursuant to Section 12(6) of the Liquor Licence Act, this Tribunal stayed the Board's Order pending the final decision of this Tribunal.

The licensed premises consist of three areas: one located in the basement; the other two, adjoining one another, are located on the first floor. According to the

testimony of two police officers, on Sunday, March 16th, 1986, following up on information that patrons were leaving the premises quite late, they entered the premises at 1:55 a.m. dressed in plain clothes and conducted a "routine check". They found approximately 100 persons present. Music was playing and some of the patrons were dancing while a number of others were drinking what appeared to be alcoholic beverages. One of the officers put it - everything looked like business as usual. Some ten minutes later, the officers saw the General Manager drinking what was later identified as liquor from a white coffee cup. As a result of this investigation, charges of serving liquor outside prescribed hours and failing to remove signs of service and consumption of liquor within 45 minutes of closing contrary to the Liquor Licence Act were laid against the Applicant and two employees. Some, possibly all, the charges were later dismissed. There was conflicting information on this point, but it has no bearing on the Tribunal's final decision.

The sole officer and director of the Applicant was not present at the Tribunal hearing, and the Tribunal gathers that he was not and is not personally involved in the day to day operations of the business. The operating responsibility was delegated to a general manager. The Applicant, through his counsel, did not deny that the breaches of the Act took place, but categorized them as technical violations. The crux of the Applicant's case was that there were mitigating circumstances and that steps have been taken to insure that there will be no repeat of the breaches of the Act.

George Bogles, who was subpoenaed by the Applicant, testified that at about 1:25 a.m. on March 16th, 1986, he got into a fight with another patron at the Le Connaisseur Tavern. During the fight several tables were overturned and glasses were broken. He said he left the premises at about 1:40 a.m. This altercation was confirmed by the bartender. He said that the waitresses had gone to the dining area and kitchen when the incident began and remained there for about 15 minutes after the disturbance was over. He said that he was in the midst of closing the bar when the fight broke out and that by about 1:45 a.m., the bar had been cleaned up.

Three other witnesses were called on behalf of the Applicant to speak to the operational and senior personnel changes which had been made since the Liquor Licence Board's decision.

Mr. Riewaldt and Mr. Fraser essentially gave evidence relating to the search carried out on behalf of the Applicant for a new general manager for the premises. However, Mr. Fraser who is an Operations Director for Magna International, a related company of the Applicant, actually was involved in the daily operations of the premises during January, 1987. During that period, he put in food and liquor controls and tried to upgrade the management skills of the then employees. As part of this effort, the managers attended the seminars sponsored by the Liquor Licence Board. The general staff was also coached on the requirements of the Liquor Licence Act.

In addition to the Director of Operations, a new General Manager, Raymond Feringer, has recently been appointed. Mr. Feringer has a twenty-five year employment history in the hospitality industry both in Canada and elsewhere. He has a six month contract which contains performance incentives, including an opportunity to buy into the business. Mr. Feringer said that it was his intention to change the attitude of the staff and to change the character of the clientele. He said that he wanted to make the Le Connaisseur an upscale quality dining lounge, superior in every respect in the industry.

Mr. Grannum, counsel for the Liquor Licence Board, submitted that there was no doubt that persons had been consuming alcoholic beverages beyond the time prescribed in the regulations to the Act and that the premises had not been cleared of all evidence of consumption in time. He said that although evidence of the altercation between patrons near the closing time had not been presented to the Board, nevertheless the three day suspension imposed by it should be confirmed to act as a deterrent both to the licence holder and to others.

Mr. Marrocco, counsel for the Applicant, questioned whether one incident which occurred a year ago afforded a reasonable basis for the belief that the business would not be carried on in accordance with the law. He pointed out that there were extenuating circumstances surrounding the incident and that the police officers had arrived at the premises only ten minutes after the evidence of consumption should have been cleared away. He also pointed to the changes made by the Applicant to the management team, which he submitted afforded a basis for the belief that in future, the business would be carried out in accordance with the law.

Section 9(22) of Ontario Regulation 581 under the Liquor Licence Act reads as follows:

All evidence of the service and consumption of liquor shall be removed within forty-five minutes after the sale and service of liquor ceases in a licensed premises.

The Tribunal is satisfied that on March 16th, 1986, there were breaches of this regulation. While there may have been some mitigating circumstances on the clean-up issue, there was and is now no excuse for the consumption of liquor after hours by the then General Manager. That General Manager, who knew or ought to have known the law on this issue and who should have set the proper example for others, is only now being removed, almost a year after the event.

The Tribunal notes that the Applicant has over the past year taken some steps which it hopes will forestall future infractions. Major among these steps is the very recent appointment of Mr. Feringer as the new General Manager. Mr. Feringer's resume is impressive. However, he has just been appointed and his appointment is for a six month period only. If he performs up to the expectation of the Applicant, no doubt his contract will be extended, but in the meantime, he appears to be a probationary employee. There is also the possibility that at the end of six months, Mr. Feringer may not wish to continue his contract. Mr. Fraser does not appear to be directly involved in the operation of the business although Mr. Feringer reports to him.

Notwithstanding the good intentions and the token and proposed changes in operation, the Tribunal has some lingering reservations about the future conduct of the Applicant. Given these reservations, the Tribunal is not prepared to say that the Liquor Licence Board had no grounds for its belief or that it acted unreasonably in imposing a suspension. However, the Tribunal believes that in the circumstances of this case, a one day suspension is appropriate.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby alters the Decision of the Liquor Licence Board dated the 27th day of November, 1986, and directs that the Dining Lounge Licence issued to Sun-Trac Investments Inc., be suspended for (1) day, the date of such suspension to be determined by the Liquor Licence Board.

ENZO TORTORELLI and
CAMPITELLO MATESE SOCIAL CLUB OF TORONTO

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

THAT no further Special Occasion Permits be issued
to Enzo Tortorelli, or to the Campitello Matese
Social Club of Toronto, et al

TRIBUNAL: LACHLAN CATTANACH, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
RONALD W. CHEMIJ, Member

APPEARANCES:

S.A. GRANNUM, representing the Liquor Licence Board

No one appearing for the Applicant

DATE OF

HEARING: 29 April 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Campitello Matese Social Club of Toronto from the Decision of the Liquor Licence Board of Ontario dated the 9th day of January, 1987, whereby the Board refused to issue any further Special Occasion Permits to Enzo Tortorelli, or to the Campitello Matese Social Club of Toronto, or to any officer, director or member thereof, for the premises at 524 Oakwood Avenue, Toronto, or at any other location.

The Board had originally issued a Notice of Proposal dated the 8th day of October, 1986, and the Licensee requested a hearing before the Board. Notice of Hearing was issued on October 16th, 1986, and the hearing before the Board was held on the 11th of December, 1986, at which time Mr. Tortorelli, together with his counsel appeared. The Decision was reserved and the formal Decision of the Board issued on January 9th, 1987, whereby the Board ordered that no further Special Occasion Permits be issued to the Licensee.

The Tribunal has heard the evidence of the Police Officer, Randy Gow, as to the events which occurred on August 23rd, 1986. The witness outlined the problems associated with these premises and also detailed the various charges which had been laid on that particular date. The witness had personal knowledge of the premises and he gave evidence as to complaints from the citizens, the lack of control and the fact that there was no evidence that persons entering the premises at the time that the Special Occasion Occasion permits were in force were actually members of the Club. The witness also referred to the fact that many of the applications for the Special Occasion Permits were made by Rev. Joseph Aiello but that on the various occasions that the Police Officer had been in attendance on the dates of the Special Occasion Permits, Joseph Aiello had never been in attendance. The witness confirmed that Mr. Tortorelli was usually in attendance at the premises but that he had never seen any other directors of the Club present on these occasions.

Counsel for the Board has referred to the various documentation which is filed with the Record of Proceedings and referred to the fact that a numbered Company 544527 Ontario Limited is the lessee of the premises at 524 Oakwood Avenue. One of the documents filed by counsel was a copy of the initial notice under the Corporations Information Act which revealed that Mr. Tortorelli is the President, Secretary and Treasurer of 544257 Ontario Limited. Included in the documentation filed was a lease of the premises dated January 23rd, 1983, between La Caverna Ballroom Ltd. and Joseph Aiello, in Trust, for a Corporation to be incorporated, carrying on business under the firm name and style of "The Love Cove." Further evidence was submitted to confirm that the numbered Company, 544527 Ontario Limited, carries on business as "The Love Cove." This was confirmed by an amendment to the original lease dated the 31st day of January, 1983.

There was also filed a copy of an Agreement dated the 31st day of January, 1986, between Campitello Matese Social Club of Toronto and 544527 Ontario Limited providing for the rental of the second floor premises at 524 Oakwood Avenue. This Agreement provided that the rental fee consisted of the total entrance fee paid by the members of the Club for each event held.

Documentation was also filed to confirm that Mr. Tortorelli is also the President and Director of the Campitello Matese Social Club of Toronto. A copy of the objects of the Club were filed as part of the Record of Proceedings.

There is no evidence filed either before the Tribunal or before the Liquor Licence Board as to any donations which might have been made by the Club in accordance with its objects. There was the evidence filed that Mr. Tortorelli was both the President of the numbered Company and the President of the Social Club.

There was also filed before the Tribunal a list of the various permits for the period issued from April 12th, 1986 to May 9th, 1987 and it would appear that Special Occasion Permits were issued weekly over a period of approximately thirteen months for the said premises and each permit was issued for a Saturday evening. The only names appearing as permit holders during this entire period were Mr. Enzo Tortorelli and Reverend Joseph Aiello

No person appeared on behalf of the Applicant although an Affidavit of Service was filed as an Exhibit to these proceedings.

The Tribunal finds that upon the evidence before it, the Club known as the Campitello Matese Social Club of Toronto is not operating as a Club within the meaning of the Liquor Licence Act and that the operation is being carried on for the gain or profit of the individuals involved in the numbered Company 544527 Ontario Limited. The Tribunal further finds that the past conduct of the Club, its officers or members affords reasonable grounds for belief that the sale and service of liquor under Special Occasion Permits will not be carried on in accordance with law.

Therefore, by virtue of Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 9th day of January, 1987.

MANUEL AMORIM

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
J.T. HOGAN, Member

APPEARANCES:

MANUEL AMORIM, appearing on his own behalf

GAIL MIDANIK, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF HEARING: 10 February 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Manuel Amorim, is appealing the proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse to grant him registration as a motor vehicle dealer under the Motor Vehicle Dealers Act. (In actual fact, Mr. Amorim has applied to be registered as a wholesale dealer only, although there is no specific provision in the Act for this designation).

In the Notice of Proposal to Refuse Registration (Exhibit 3), the Registrar expressed his opinion that the Applicant could not reasonably be expected to be financially responsible in the conduct of his business and further, that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Dealing first with the issue of financial responsibility, the Registrar informed the Tribunal that there are two judgments outstanding against Mr. Amorim. The first for approximately \$12,000 relates to a claim of the Motor Vehicle Accident Claims Fund, which has been outstanding since 1978. The claim arose because Mr. Amorim had inadequate car insurance. Mr. Amorim is currently repaying the Fund at the rate of \$25.00 per month. The second

judgment, in the amount of some \$2,500 is jointly against Mr. Amorim and an Ana Amorim, who is said to be his niece. This judgment has been outstanding since 1984 and there was no evidence that any effort has been made by Mr. Amorim to discharge this debt. Mr. Amorim claimed that the judgment arose out of a debt incurred by his niece for unpaid rent. Mrs. Amorim further explained that to assist his niece in obtaining rental accommodation, Mr. Amorim had represented himself to the landlord as his niece's husband and had entered into a lease on that basis.

Given these outstanding judgments, the Registrar was of the opinion that Mr. Amorim did not have the needed financial resources to successfully begin a business of buying and selling cars. However, Mr. Amorim has testified that he has sold some property in Portugal and that he expects to receive some \$55,000 from this sale which he would use in the business. The money is not in Canada now. Aside from these potential funds, Mr. Amorim seems to have very limited capital which is more than offset by the two judgments.

In addition to the judgments, the Registrar, in forming his opinion on lack of financial responsibility on the part of the Applicant, pointed to the fact that Mr. Amorim had a somewhat chequered employment history in the past, having been unemployed for fairly long periods of time. On this issue, Mr. Amorim said that he had suffered two minor heart attacks, and therefore was unable to work at jobs requiring heavy exertion. He is presently employed as a truck driver.

The past conduct which was of concern to the Registrar related to a number of charges and convictions. The first of these charges was laid in May, 1979. A conviction for being in possession of stolen property resulted in a \$500 fine. In December, 1984, Mr. Amorim was convicted of two charges, one of theft and one of attempted theft and sentenced to 60 days and placed on probation for six months. In February, 1985, while still on probation, the Applicant was found guilty of possession of stolen property and fined a further \$500. Finally, in September, 1986, Mr. Amorim pleaded guilty to a charge of attempted theft and sentenced to 60 days and placed on probation for one year. If the testimony of Mr. Amorim and his wife is to be believed, Mr. Amorim was an innocent victim or dupe in each instance.

The Tribunal has carefully weighed all the evidence in this case. Mr. Amorim has significant judgments outstanding against him, one of which, under his current repayment schedule, will not be retired for several decades. Mr. Amorim did not act with integrity or honesty in his dealings with the landlord. Baldly stated, Mr. Amorim knowingly participated in a deception against the landlord to the landlord's detriment, and has now refused to accept the responsibility for his action.

At this time, Mr. Amorim has virtually no available capital in Canada and no supporting evidence was offered that he will have it in the near future. The Tribunal requires more than Mr. Amorim's unsubstantiated testimony that \$55,000 is available to give any weight to that testimony. With reference to the convictions, the Tribunal is of the view that the five separate convictions speak for themselves, and that if there were mitigating factors, they were taken into account when the penalties were imposed. Mr. Amorim, having been convicted most recently only some four months again, is still on probation and will continue to be so until September of this year.

In these circumstances, the Tribunal concludes that the Registrar has shown sufficient grounds for belief that Mr. Amorim cannot reasonably be expected to be financially responsible in the conduct of his business as a wholesaler dealer in used cars. The evidence of past conduct also affords reasonable grounds for belief that Mr. Amorim will not carry on business in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

COMA COUNTY CARS
WILLIAM C. THEAKSTON
PAUL W. BRAYBROOK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
MICHAEL E. LERANBAUM, Member
KEITH T. COULTER, Member

APPEARANCES:

PAUL W. BRAYBROOK, on his own behalf
and as agent

JOHN W. BURTON, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 26 August 1987 Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal dated May 8, 1987, the Registrar, Motor Vehicle Dealers and Salesmen, proposed to refuse registration to Coma County Cars as a motor vehicle dealer and to William C. Theakston and Paul W. Braybrook, the partners in Coma County Cars, as motor vehicle salesmen. The Registrar's reasons for his Proposal were that the past conduct of the two individuals provided reasonable grounds for belief that the business, which is the sale of used cars, will not be carried on in accordance with law and with integrity and honesty.

At the commencement of the hearing, the Tribunal was advised that Mr. Theakston was no longer pursuing his appeal and was no longer involved in the partnership. The Tribunal is therefore only dealing with the appeal of Coma County Cars, which is now a sole proprietorship, and of Paul Braybrook.

Robert Livingston, the Assistant-Registrar, who was the sole witness for the Ministry stated that the Registrar was concerned that the two Applicants - Messrs. Theakston and Braybrook had extensive criminal records and in particular he was concerned about the recent 1986 conviction of Mr. Theakston. Mr. Livingston confirmed that there was complete

disclosure of these convictions in the applications for registration.

Mr. Braybrook, now 40 years old, married with four children, who gave evidence on his own behalf, does have a criminal record which began in August, 1970. The last conviction, for by far the most serious series of offences, occurred in August, 1981. As far as the Tribunal is aware, he has had no further encounters with the law in the intervening years.

Mr. Braybrook informed the Tribunal that he had been registered as a motor vehicle salesman as recently as a year ago. At that time, he said he had disclosed his past record to the Registrar and had obtained registration with no terms or conditions attached. To the surprise of the Tribunal, the Ministry officials present at the hearing appeared to have little or no knowledge about Mr. Braybrook's previous registrations as a salesman. The recent past registration was confirmed by Mr. Livingston from the information contained in the application, however he could not provide any further information on the matter.

At the present time, Mr. Braybrook is operating an auto body repair shop in Barrie. He is in the process of buying a house and he is about to become a father once more. He told the Tribunal that, from time to time, he has the opportunity to sell cars which are brought to him for repairs, and it is for that reason that he wishes to be registered as a motor vehicle dealer and personally as a salesman.

Mr. Braybrook candidly admitted his past criminal record and as previously noted, he made full disclosure in this and the earlier application. He made no effort to hide the fact that he is a member of a motorcycle club and that he intends to continue that association. He also disclosed his past use of drugs and alcohol. He stated that he has paid dearly for his past mistakes and now wishes to put them behind him and to get on with his life.

On the little evidence before it, it appears that the Registrar's principal objection to granting registration was Mr. Theakston. Mr. Theakston is no longer in the picture. Mr. Braybrook was recently registered as a salesman, apparently with no conditions attached. That registration expired. It has not been revoked, and there were evidently no complaints.

The Tribunal understands the Registrar's apparent concerns and to some extent shares them. However the Tribunal is not satisfied, on the evidence, that the public will be at risk or that there are sufficient reasonable grounds for belief that Mr. Braybrook will not carry on business with honesty and integrity or that the business will not be carried out in accordance with the law.

Therefore, while the Tribunal is of the opinion that registration should be granted to the sole proprietorship, Coma County Cars, as dealer and to Mr. Braybrook, as salesman, it should be subject to terms and conditions. These are that William C. Theakston not be associated in any way, either as partner or employee or otherwise with Coma County Cars and that the registrations be reviewed by the Registrar in six months time and again when the registrations are first subject to renewal under the Act or Regulations.

By virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar not to carry out his Proposal against Paul W. Braybrook and Coma Country Cars but to grant registrations subject to the terms and conditions set out above.

Although the Tribunal was told that Mr. Theakston was not pursuing his appeal and he did not appear before it, the Tribunal further directs the Registrar to carry out his Proposal with respect to William C. Theakston.

76690 ONTARIO INC.
 METROPOLITAN LEASING & RENTALS)
 LOYD RIPANI

APPEAL FROM A PROPOSAL OF THE
 REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
 TO REVOKE THE REGISTRATIONS

RIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
 DR. STUART E. ROSENBERG, Member
 HERBERT A. KEARNEY Member

PEARANCES:
 JEFFREY R. MANISHEN, representing the Applicants
 JOHN W. BURTON, representing the
 Registrar of Motor Vehicle Dealers and Salesmen

ATE OF
 EARING: 22 July 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Lloyd Ripani and his limited Company, 76690 Ontario Inc., carrying on business as Metropolitan Leasing & Rentals, were registered on December 3rd, 1986, under the Motor Vehicle Dealers Act.

At the time of registration, Ripani was in custody in Hamilton having been convicted of an offence under the Criminal Code of trafficking in cocaine. He had also had a previous conviction in 1984 for impersonating another individual in the use of a credit card which did not belong to him.

His background, however, as disclosed, would hardly indicate any inclination towards crime. He had been a first class constable on the Hamilton Police Force for seven years resigning as the result of his first conviction. He then went into the automobile trade, became registered as a salesman and worked in that capacity for three dealers in Hamilton, all of whom appeared to find him a satisfactory employee.

On November 27th, 1986, having been convicted of conspiring to traffick in cocaine, he was sentenced to one year in jail and eighteen months probation. On that date, he began

to serve his sentence but was released on parole shortly thereafter on January 14th, 1987. At the time of this appeal, therefore, he is on parole which is to expire on November 27th, 1987.

It is clear that although Ripani was charged with this latest offence, he nevertheless applied for registration of his Company as a dealership and himself as a salesman. The Registrar in his evidence pointed out that there is a space in the application reserved for previous criminal offences which the Applicant is expected to complete. Mr. Ripani had left this space blank. Asked why he had done so, he replied that he had asked the Human Rights Commission and was told he was not obliged to answer any questions regarding previous criminal convictions. He, therefore, left the question unanswered. His evidence on that point was believable but it results in a curious interpretation of the law creating a conflict which negates the truth.

On January 14th, 1987, Ripani was released from custody and took over his automobile business which in the interim period had been operated by one Brian Twiss, also registered as an automobile dealer. Those are the simple facts of the case.

The Registrar, having learned of the convictions, now proposes to revoke both the licence of Ripani and his Company under Section 6 of the Motor Vehicle Dealers Act. In his Proposal, the Registrar relies on Section 6(1) and Section 6(2) which state:

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration.

In his evidence, the Registrar pointed out that had the information concerning Ripani's criminal activity been available to him at that time, he would not have allowed their registration relying on Section 5(1)(b) and Section 5(1)(c)(ii) and Section 5(1)(d) of the Motor Vehicle Dealers Act which state:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

.

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

.

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

These sections are both relevant and important to the Registrar in his consideration of an application and of equal significance to the Tribunal in its deliberations on this matter.

We find no fault with Mr. Ripani for his failure to disclose his record which was based upon what he considered to be good legal advice from a quasi judicial authority and it is not his attempt to conceal from the Registrar that record that is in issue. We are, however, of the view that had there been disclosure neither Ripani nor his Company would have been registered under the Act. But is this then in itself sufficient

for the Tribunal to sustain the Proposal of the Registrar to revoke these licences?

Let us look at other factors. Evidence adduced by Mr. Manishen of Mr. Ripani's recent conduct is most favourable to him and was uncontradicted. Letters admitted in evidence from business associates give him a satisfactory reputation. Further, his operation of the motor vehicle dealership appears to be without blemish or complaint.

But, there are other considerations. The evidence is that the Company is involved in purchase of vehicles from dealers and their sale to other dealers, some in the United States. Little or no business is done with the general public on a retail basis. We are, therefore, troubled by the fact that the name under which the business is being operated is Metropolitan Leasing and Rentals but there is no evidence of any vehicles being either rented or leased or the intention to do so. We wonder about the purpose in carrying on a business the name of which is misleading since the Company is not engaged in that business, has not been, and does not appear that it will be in future. The disparity between the Company's actual business and what it holds itself out to do is unexplained.

The greater concern, however, is the fact that Mr. Ripani is on parole which will not expire until November 27th of this year. The Registrar has stated quite clearly his opposition to any Applicant being registered while on parole considering it inconsistent with the Act. Although Mr. Ripani is not an applicant for registration, already having a licence, the fact remains that the licence would not have been granted at all had the facts been disclosed. The Tribunal is, therefore, in agreement that it is inappropriate for Mr. Ripani to be registered under the Act while on parole.

One final factor in the opinion of the Tribunal is that there appear to be no extenuating circumstances which would require or even influence the Tribunal to alter the decision of the Registrar. It will, therefore, be sustained.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

BRIAN F. SUNDERLAND

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
HERBERT A. KEARNEY, Member

APPEARANCES:

BRIAN F. SUNDERLAND, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 20 February 1987

Toronto

REASONS FOR DECISION AND ORDER

Brian F. Sunderland, the Applicant, is appealing the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen under the Motor Vehicle Dealers Act, to refuse him registration as a salesman. This is the second time that Mr. Sunderland has applied and been refused by the Registrar. In both cases it was the opinion of the Registrar that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

No evidence was called on behalf of the Registrar to support his opinion that registration should be refused. Counsel for the Registrar relied essentially on the facts and findings of this Tribunal in its Reasons for Decision issued in July 1985, when the first refusal to register was upheld. It was the position of the Registrar, as put forward by his counsel, that the change in circumstances was not material and did not warrant a reversal of opinion.

Mr. Sunderland appeared on his own behalf. He filed several letters of reference and called as witness, Daniel Marin, owner of Dan's Auto Centre and Dan Marin Services Ltd. who was his one time employer and would be his future employer if he was registered under the Act as a salesman.

The relevant facts very briefly are as follows:

In October, 1983, Mr. Sunderland had been registered as a salesman under this Act. According to the undisputed allegations contained in the Registrar's Proposal, Mr. Sunderland obtained this registration by providing a false and misleading application which failed to disclose his criminal record. In February, 1984, Mr. Sunderland was convicted of the very serious offence of conspiring to traffic in narcotics and sentenced to imprisonment for four years. At that time his registration as a salesman was terminated.

When Mr. Sunderland reapplied for registration in November, 1984, he again filed a misleading application in that full particulars of all his criminal convictions were not disclosed. Furthermore, at that time, he was still serving his sentence and was residing in a halfway house in Ottawa. On the basis of those facts, this Tribunal, in July, 1985, agreed with the Registrar that the application should be refused. The Tribunal went on to say:

The prospect for improvement in Mr. Sunderland's position and for his suitability for consideration for registration at a date somewhere in the future, depending upon the circumstances in which he achieves the expiration of his parole and his employment record in the interim, appears extremely hopeful.
(emphasis added)

Mr. Sunderland submits that since that decision was rendered, there have been material changes in circumstances. He points to the passage of time, the fact that there have been no arrests or convictions during that period, that he has married and that he has been constructively employed during most of that period. He asks to be registered as a salesman so that he can be given an opportunity to rehabilitate himself and prove himself to be a responsible person. He was very strongly supported in his plea for registration by Mr. Marin.

The letters of recommendation filed by Mr. Sunderland were solicited by him to support his application. The persons from whom the letters were requested were told why the letters were needed. For the most part the letters are from satisfied customers who were served by Mr. Sunderland while he was employed as a service representative at Myers Auto in Ottawa.

phrases such as "high principled individual with high personal standards, and above all integrity", "reliable and trustworthy", "at no time was his integrity in question", "absolutely trustworthy" were used to describe Mr. Sunderland. The words "courteous" and "helpful" were also used. The John Howard Society, which is supervising his parole which extends to February, 1988, also supported his application for registration, as did two fellow employees at Myers.

At the time of this hearing, Mr. Sunderland was unemployed. He said he had been laid off at Myers because of lack of work. He subsequently had obtained employment for a short period with Mr. Marin, but was again laid off. Mr. Marin advised the Tribunal that if Mr. Sunderland was registered as a salesman, he could begin work immediately; however, if he was not, then he might obtain employment as a service representative later in the Spring.

The only changes in circumstances since the last application are that Mr. Sunderland has married and has not been in difficulties with the law for a longer period of time. Since he has been on parole, reporting to his parole officer monthly, and will continue to serve out his sentence in this manner for a further year, it is to be expected that Mr. Sunderland would conduct himself in a lawful manner during this interval. Clearly those customers who wrote were satisfied with his attitude and work performance, as was his parole officer. Mr. Sunderland appears to be in the process of rehabilitation, but this process is not yet complete. It should be completed before registration is permitted.

The Tribunal does not believe that the changes in Mr. Sunderland's life are of such magnitude as to render the Registrar's opinion and Proposal unreasonable at this time. Since the Tribunal cannot support such a finding, it is not prepared to direct the Registrar to refrain from carrying out his Proposal.

Therefore by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

FRANK SZARKO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
MICHAEL E. LERANBAUM, Member
HERBERT A. KEARNEY, Member

APPEARANCES:

DEBORAH L. DITCHFIELD, representing the Applicant
JOHN W. BURTON, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 10 June 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Frank Szarko, is appealing the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse to grant registration to the Applicant as a motor vehicle salesman. In the Notice of Proposal dated January 14th, 1987, the Registrar states that it is his opinion the Applicant is not entitled to registration under Section 5 of the Motor Vehicle Dealers Act "as the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

The facts are not in dispute. During the period August 29th, 1974 to December 4th, 1984, the Applicant has been convicted of numerous offences under the Criminal Code. These offences include mischief, 18 charges of fraud, uttering a forged document, false pretences, two charges of theft over \$200, harassing telephone calls and one charge of assault. The Applicant has been fined, incarcerated and placed on probation for these offences. The December 1984 charge of assault resulted in the Applicant being placed on probation for a period of 18 months. He was also required to make restitution and to perform community work.

On July 4th, 1984, the Applicant applied for registration as a motor vehicle salesman. In answer to a question relating to past convictions, the Applicant indicated by his answer that he had never been convicted

under any law. This answer was patently false. The Registrar, being totally unaware of the past criminal activities, granted registration to Mr. Szarko, who then became employed with Mazzuca Motors and Supply Limited. Four months later, Mr. Szarko's employment was terminated. Since Mr. Szarko could not obtain further employment as a motor vehicle salesman, his registration lapsed.

On May 16th, 1985, Mr. Szarko again applied for registration. This time he showed on his application that he had "12 months probation for fraud charge in 1979." The question was again falsely answered since full particulars, as required, were not given. Mr. Szarko omitted to provide particulars of the five convictions imposed since 1979 and made no mention of the first conviction imposed in 1974.

Following an investigation based on that application, the full extent of Mr. Szarko's criminal record became known to the Registrar and the Registrar refused to grant registration. Mr. Szarko appealed the Registrar's Proposal, but at the last moment, he withdrew his appeal.

On November 30th, 1986, Mr. Szarko again applied for registration. This time he omitted to disclose the conviction for assault which occurred in December 1984, so once again, he failed to fully disclose all the convictions against him. The Registrar once again refused to grant registration for the reasons referred to above.

The Registrar, Stephen Moody, testified that he was concerned by the fact that the Applicant had not answered the questions honestly and the nature of the crimes. It was his opinion that there had been no evidence before him which showed that there was a material change in circumstances since the previous application. He agreed with Mr. Szarko's counsel that in context, a change in marital status could be material and that terms and conditions could be imposed as a condition of registration.

The witnesses called on behalf of Mr. Szarko were essentially character witnesses. The Applicant's wife, Lynn Szarko who holds a responsible management position with a bank, testified that she and the Applicant had married in August 1986. She said she knew of her husband's previous criminal record before the marriage. It was her opinion that her husband had made mistakes in the past, had paid for them and now wanted to make a new life for himself. She expressed the view that her husband would act with honesty in the future.

William McKeown, now in the real estate field, testified that Mr. Szarko had worked for him as his assistant in a motor vehicle dealership for about two months. Mr. McKeown found Mr. Szarko keen and he thought that Mr. Szarko would make an excellent salesman. He said he knew of Mr. Szarko's criminal record at the time, but on further examination, it was found that he was only aware of the assault charge. The disclosure of the additional convictions did not alter Mr. McKeown's judgment of Mr. Szarko.

Denis Andre, a probation officer was also called. He testified that he had been Mr. Szarko's probation officer on two occasions. He said that Mr. Szarko had complied with both probation orders and that he was surprised when Mr. Szarko got into trouble again in December 1984. He thought that if terms and conditions were imposed as a condition of registration, Mr. Szarko would comply with them.

Mr. Szarko testified on his own behalf. Now 31, Mr. Szarko in 1979 was married with two children. He said the convictions for fraud arose because he was passing bad cheques so that he could buy clothing, groceries and toys for the children. He also had explanations (perhaps "excuses" is a better word) for his past conduct. He said he lied on his applications because he believed that if he told the truth, he would never be registered and never get a decent job. He stated that he was ashamed of his past and now that he had remarried, he wanted to have a family and the means to support it. He told the Tribunal that he liked to sell cars and expected that with his new employer, he could earn about \$7,000 to \$8,000 per month. He said that he had told some of his previous employers that he had a criminal record but he never went into all the details. For example, he told Mr. Dniprenko, the Manager of the dealership where Mr. Szarko now works, that he had "done time" over four years ago. He concluded his testimony by saying that he had learned his lesson and had grown up in the last four years.

On his new application dated June 10th, 1987, Mr. Szarko shows that during 1985, he was employed selling surplus goods and during 1986, he was unemployed. Since January 1987, he has been employed by three auto dealers in various capacities, but not as a car salesman. His most recent employer is Acura Sherway. Mr. Dniprenko, in a letter addressed to the Tribunal, stated that Acura Sherway was prepared to hire Mr. Szarko as a motor vehicle salesman upon certain conditions. Mr. Dniprenko stated that Mr. Szarko had been with the dealership for five weeks and that he "will be a valuable addition to our sales force..."

The Tribunal has considered the facts in this hearing and the testimony given on behalf of Mr. Szarko. The Tribunal has also had the benefit of hearing and observing Mr. Szarko while he gave his testimony. The Tribunal would like to believe that Mr. Szarko has changed, or grown up as we put it, but aside from the fact that he is now married to a woman who is clearly an intelligent, hard working individual with a responsible position, little has changed since Mr. Szarko last applied for registration in May, 1985. Mr. Szarko is no longer on probation, but he continues to misrepresent the whole truth about his past both to his employers and to the Registrar. He is unable to hold a position for long, perhaps through no fault of his own, but nevertheless this is the case. He has some unrealistic expectations about future earning potential should he become a motor vehicle dealer salesman, at least in the short term. We can only speculate about his conduct should his earnings be less than expected. During the past two years, he has not acted with honesty and integrity.

In order to direct the Registrar not to carry out his Proposal or direct that Mr. Szarko be registered for a probationary period subject to terms and conditions, the Tribunal would have to be satisfied that the Registrar was in error or did not have reasonable grounds for his belief. In the circumstances before it, the Tribunal can not make that finding.

The Tribunal wishes to reaffirm that a criminal record is not of itself a permanent bar to registration as a motor vehicle salesman. There are many other factors which have a bearing on the final decision. The denial of Mr. Szarko's application at this time does not preclude him from re-applying for registration in the future under Section 8 of the Act. If he continues to conduct himself and work within the law and with honesty and integrity over some period of time, that could constitute a material change in circumstances. For the present however, the Tribunal is of the opinion that registration should be refused.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

ARMIN AREND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

ARMIN AREND, on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 10 November 1987

Toronto

REASONS FOR DECISION AND ORDER

In October, 1986, Armin Arend, purchased a house which was covered by the remaining first year warranty provided under the Ontario New Home Warranties Plan Act. On closing, Mr. Arend obtained from the vendor (who was the first owner of the property) a copy of the Enrolment of Home Notice which was completed by the builder and was dated December 18th, 1985, a Certificate of Completion and Possession which was undated, but was signed by someone purporting to be the builder/vendor and one of the purchasers. This Certificate unequivocally states that the date of possession was May 30th, 1986 and it shows no items which either require correction or completion. There is a vendor's certificate on the back of this document which states that the vendor certifies that "the home...is substantially completed and is ready for possession...on the date of possession indicated on the face hereof...".

Mr. Arend testified that after moving into the house with his family, he noted several defects. He complained to the builder and in fact several defects were more or less corrected. However, relying on the possession date shown on the Certificate of Completion and Possession, he did not file claim with the Ontario New Home Warranty Program until March 3rd, 1987, well within one year of the date shown.

The defects, as set out in the letter, are as follows

1. The floor joists under the dining room floor on the side of the hallway wall have split and therefore bent through now. The floors of the dining room and the hallway are definitely (sic) warped.
2. The heat pump has been installed contrary to the manufacturer's instruction by being attached to the building wall instead of on its own concrete platform. The result of this platant (sic) disregard of the manufacturer's instruction causes unnecassary (sic) vibrations and noise and the water to be drained towards the wall of the house.
3. Roof shingles are falling of (sic).
4. Water is running through the roof of the garage and dripping through eaves.
5. During rain falls liters of water come down the chimney since it does not have a rain cap or hood.
6. Water is entering through the basement wall.
7. The breakfast area ceiling has not been repainted since our water leakage in November.

The Program agrees that Items 1, 4, 6 and 7 would be rantable if the defects were brought to its attention within first year of the warranty. (Mr. Arend has subsequently withdrawn his complaint with reference to Items 3 and 5. Item s in dispute.)

Evidently after receiving the complaint, Program icials could not find any records related to this house er than its enrolment in January, 1986. They then spoke n the builder and were told that one of the original owners taken possession of the house in December, 1985. After using Mr. Arend's claim, the Program issued the Warranty ificate, which was dated July 14th, 1987 and which showed a

date of possession of December 1st, 1985.

In a letter dated June 29th, 1987, to Mr. Arend, the Regional Manager of the Program states:

We have been advised that the Certificate of Completion and Possession was left with the owner's lawyer and it remained with him until May. It was dated and signed in May...but that does not change the legal date of possession which was December 1, 1985.

...Inaccurate information has confused the situation but I doubt if you could prove fraud."

A later letter to Mr. Arend from the Program dated August 28th, 1987, reads in part:

It is the decision of the Warranty Program that your complaints were not submitted within the warranty period as spelled out in Section 14 of the Act.

Our records show that the warranty on this property expired on December 1, 1986, whereas your complaint was received on April 2, 1987.

It is acknowledged that an error had been made by either the first owner or the first owner's lawyer in placing the wrong date of possession on the Certificate of Completion and Possession. This did cause confusion but did not change the date on which the warranty actually started.

Mr. Arend now appeals that decision to this Tribunal.

The major issue for this Tribunal to decide is the commencement date of the warranty. The Program relies on the following:

- an Occupancy Permit issued by the Town of Flamborough dated December 17th, 1985 which permit states that the

house is "partially completed" and lists items to be completed;

- a letter dated January 7th, 1986 from the solicitor for the first owners indicating a payment to the builder of \$35,450.00 "representing the amount of your invoice #85 100 less 10% holdback...the sum of 10% is to be held back for 45 days following the completion of the dwelling";
- a further Occupancy Permit dated October 8th, 1986, which indicates that the house is fully completed;
- a letter dated September 16th, 1986 from the Town Building Department which refers to a revised Occupancy Permit granted on September 10th, 1986, which showed several items of construction to be completed;
- a letter prepared for Mr. De Faria, one of the original owners and signed by him which states that he took possession on December 1st, 1985, and that "seasonal work and minor details" remained to be completed;
- a sworn statement of Ron Hoekstra which states that he filled in the date of May 30th, 1986 as the date of possession incorrectly as that was the date the Certificate was completed; and
- a supplementary realty tax bill indicating that it is effective February 1st, 1986.

The Program also relied on the testimony of Richard Hoekstra and Ron Hoekstra. Mr. De Faria, the original owner, was not called.

Mr. Arend relies on the Certificate of Completion and Possession and the Enrolment document.

Where there is conflicting evidence, the Tribunal will

give greater weight to the original written documentation of uninterested parties. Dealing first with the evidence of the Program, it is clear that the Program had no documents relating to this house other than the enrolment. Its statement that "our records show..." as set out in its letter of August 28th, 1987 is misleading. Given Mr. Ron Hoekstra's evidence, it was also inaccurate to say that the "error had been made by either the first owner or the first owner's lawyer..." Mr. Hoekstra inserted the possession date of May 30th, 1986, but he cannot recall when this was done.

On the evidence before it, the Tribunal finds that the house in question was not completed on December 1st, 1985, and appears not to have been fully completed to the standards of the Town of Flamborough until October 8th, 1986. This is in line with the testimony of Richard Hoekstra who said that he did not receive final payment of the 10% holdback until October 1986. However, the Tribunal is also satisfied that the house was substantially completed prior to the October date. The exact date of substantial completion is not known. The Tribunal prefers the evidence of the Certificate of Completion and Possession, which appears to have been prepared prior to the complaints being filed and which was signed by Ron Hoekstra and the original owner, Mr. De Faria, to that of the evidence such as it was, which was compiled by the Program and the builder after the claims were made. The Tribunal accepts the occupancy of the house as opposed to completion may have taken place as early as December, 1985.

The solicitor for the Program asks the Tribunal in essence to equate "occupancy" with the term "completed for possession". The Tribunal does not accept this equation. Occupancy can take place several months before a house is substantially completed. As an example, Richard Hoekstra stated that during the current building boom, it was possible that brick cladding would not be completed until several months after occupancy. If the date of occupancy was the key date, then in such instance, a major component of construction would not have a full first year warranty attached to it. The Tribunal does not believe that this was the intention of the Legislature. Certainly such an interpretation which could significantly shorten the warranty period is not in keeping with the principle of consumer protection.

In the Tribunal's view, Section 13(3) of the Ontario New Home Warranties Plan Act contains no ambiguities. It states that:

The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate. (emphasis added)

The date specified in the Certificate, which was completed by Ron Hoekstra (and not by the owner or his solicitor) and one of the owners gives the date as May 30th, 1987. The Tribunal accepts this date as the commencement date of the Warranty. The claims are therefore first year claims. The Muncie decision put forward by the Program as precedent cannot be distinguished and is not relevant in these circumstances. Accordingly, Items 1, 4, 6 and 7 are to be corrected.

The Tribunal has considered the testimony related to the installation of the heat pump as set out in Item 2. The Tribunal finds no defect in workmanship or materials. There is no evidence that the pump was installed contrary to the Ontario Building Code although Mr. Arend stated that the pump manufacturer's instructions suggested that the unit be placed on a cement foundation or slab. These 'instructions' were not provided with the Tribunal. In the Tribunal's opinion, this item is not warrantable under the Act.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to perform or arrange for the performance of the work in respect of Items 1, 4, 6 and 7 as set out above and to disallow the remaining claims.

ROBERT J. BOHAN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

EUGENE TRASEWICK, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 15 January 1987

Toronto

REASONS FOR DECISION AND ORDER

This hearing was held at the request of the Applicant, Mr. Bohan, to review the Decision of the Ontario New Home Warranty Program (the "Program") disallowing the claim made by him under the Ontario New Home Warranties Plan Act (the "Act").

Mr. Bohan purchased a new home in Thorold, Ontario from Mountainview Homes Ltd. He entered into the Agreement of Purchase and Sale prior to the construction of the home. The home was built and Mr. Bohan took possession thereof on February 28th, 1983. He submitted his claim to the Program within the first year warranty period provided for by Section 13(4) of the Act.

Mr. Bohan's claim for breach of warranty is based on Section 13(1)(a)(i) of the Act which provides:

(1) Every vendor of a home warrants to the owner

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material

....

Mr. Bohan's claim is that the brickwork on his home was not constructed in a workmanlike manner and is not free from defects in material. Mr. Bohan testified to the following defects:

1. Many of the header bricks were not colour matched to the surrounding brick. The mismatched headers have a reddish, spalled look and are very noticeable.
2. Many of the bricks exhibit a noticeable grayish discolouration.
3. The application of mortar was carried out in a sloppy fashion and there is mortar smeared on some of the bricks.
4. In some locations the bricks were unevenly laid.

Mr. Bohan testified that these defects have detrimentally affected the overall appearance of his home. This evidence is corroborated by photographs of the home filed at the hearing as exhibits.

Mr. Howard Richardson, a man with some twenty years of experience in brickwork and restoration work, was called as a witness on behalf of the Applicant. Mr. Richardson's observations as to the defects in the brickwork confirm Mr. Bohan's evidence. Mr. Richardson's opinion was that the brickwork as a whole was not up to an acceptable standard. He also testified that his observations led him to conclude that the bricklayer (and or bricklayer's helper) who laid the brick on Mr. Bohan's home had not inspected or culled the bricks with the result that many chipped, spalled and discoloured bricks were used. Mr. Richardson also observed that many of the header bricks were not matched to the surrounding brick.

As to the possible methods of remedying the defects in the brickwork, Mr. Richardson dismissed the use of a charcoal rez stain on the header bricks because the stain would probably wear off within six to twelve months. He indicated that it would be extremely difficult to successfully tear out all of the bad bricks and replace them with new bricks that would match the surrounding brick. In his view, the best solution would be to remove all of the bricks and re-brick the house completely.

Mr. Nick Basciano, President of Mountainview Homes Ltd., was called as a witness by the Program. He testified that he had tried to discourage Mr. Bohan from selecting the particular type of brick used on the house because of previous problems he had experienced with that brick. Mr. Bohan denies that Mr. Basciano had tried to discourage his selection of this particular brick. The Tribunal notes that the type of brick chosen by Mr. Bohan was chosen from samples displayed for selection purposes in the vendor's sales office. Even by Mr. Basciano's own account, his attempts to discourage Mr. Bohan from selecting this brick occurred only after the vendor experienced some problems in obtaining an early delivery date from the supplier. Mr. Basciano's letter to the Program dated February 20th, 1984, dealing with the deficiencies does not refer to any previous problems experienced with the type of brick chosen, but simply makes reference to the workmanship being the best that could be achieved during winter conditions.

Mr. John Nielsen, an Inspector with the Ontario New Home Warranty Program, testified that he inspected the Bohan home and found that insofar as the laying of the bricks only was concerned, the laying of the brick was, in his opinion, carried out in a reasonable manner.

Mr. John Lowood, Director of Operations for the Program, also inspected the Bohan house and he testified that, in his opinion, with the exception of three specific defects, the brickwork was carried out in accordance with the requirements of the Ontario Building Code and was not defective in materials or workmanship and that furthermore, the bricks carried out their function in that they protected the house from the weather. The Program did agree to remedy the three defects referred by Mr. Lowood, in particular, the Program was prepared to:

- a) Properly install the sill and brick courses below the front door;
- b) Straighten the crooked brick courses located approximately five feet above grade between the left front window and front door; and
- c) Straighten the two sills on the rear windows of the house.

After considering all of the evidence before it, the Tribunal has come to the conclusion that on the particular facts of this case, there has been a breach of the statutory warranty. In arriving at this conclusion, the Tribunal has

taken into account the cumulative effect of all of the various defects in the brickwork. The overall workmanship of the brickwork, in the Tribunal's view, falls below the standard that could reasonably be expected by a purchaser of a new home and below the standard that is required by the statutory warranty set out in Section 13(1)(a)(i) of the Act.

It is the Tribunal's view that compliance with the requirements of the Ontario Building Code alone is not sufficient to satisfy the requirements of the Act. Compliance with the Ontario Building Code is required by Section 13(1)(a)(iii) of the Act, that is, such compliance is insufficient to satisfy only one branch of the statutory warranty. Similarly, while the fact that the bricks protect the home from the weather probably satisfies the statutory requirements imposed on the vendor by Section 13(1)(a)(ii) of that Act, that is, the warranty that the premises are fit for habitation, the warranty provided for by Section 13(1)(a)(i) is not necessarily also satisfied. The Tribunal considers that bricks are not simply there to weatherproof the house but also serve the function of contributing to the appearance of the house, a function which this Tribunal considers to be a legitimate one, and one which is within the statutory protection of Section 13(1)(a)(i). In some cases, where the particular facts warrant (as they do in the case that is now before the Tribunal), the statutory warranty provided for in Section 13(1)(a)(i) may be breached where the defects in workmanship and/or materials result in a significantly negative effect on the appearance of a home.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow Mr. Bohan's claim and to remedy the defective brickwork by removing all of the existing brick and re-bricking the house with good quality brick of a comparable type.

421363 ONTARIO LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
WILLIAM WATSON, Member

APPEARANCES:

GORDON J. SIMPSON, its agent (on May 14 and 26)

MICHAEL S. HEBERT, representing the Applicant
(on June 22 - and then withdrawing)

BRIAN M. CAMPBELL, representing the Registrar
under the Ontario New Home Warranties Plan Act

DATES OF 14 May 1987

HEARING: 26 May, 22 June 1987

Ottawa
Toronto

REASONS FOR DECISION AND ORDER

The purpose of this hearing was to consider the Applicant's appeal from a Proposal of the Registrar under the Ontario New Home Warranties Plan Act dated November 20th, 1986 and to hear and consider what might be adduced by way of evidence and stated by way of argument both for and against such Proposal.

The Proposal reads as follows:

1. Pursuant to the provisions of Section 8(2) and Section 7(1)(c)(ii) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, (the "Act"), the Registrar finds that the past conduct of Mr. Gordon Simpson on behalf of 421363 Ontario Limited affords reasonable grounds for belief that the applicant's undertakings will not be carried out in accordance with law and with integrity and honesty, TO WIT:
 - (a) You have failed to honour a Settlement Agreement entered into between the Ontario New Home Warranty Program (the "Program") and 421363 Ontario Limited ("421363"),

which agreement set out the conditions for the renewal of registration of 421363, as agreed to by Mr. Gordon Simpson on behalf of 421363;

- (b) You have failed to comply with the provisions of a further agreement entered into by the Program and Mr. Gordon Simpson on behalf of 421363, which set out further and alternative terms and conditions of registration. The said terms and conditions are set out in a letter of June 3, 1986 from the Program to 421363 and are as follows:

- (i) Security for nine (9) units in the total amount of \$9,000.00 was to be posted;
- (ii) The Program was to be reimbursed in the amount of \$7,000.00 on account of a deposit refund claim by Martel/Lefrance.
- (iii) All outstanding certificates of completion and possession were to be submitted to the Program.
- (iv) Outstanding registration renewal fees in the amount of \$200.00 were to be paid.

None of the agreed conditions have been complied with.

- (c) Your conduct during the years during which you have been registered has resulted in the Registrar issuing five (5) proposals against you.

2. Pursuant to the provisions of Section 8(2) and Section 7(1)(d) of the Act, you have indicated that you do not have sufficient technical competence to consistently perform the warranties, TO WIT:

- (a) During the years of registration, you have constructed twenty-four (24) homes, of which ten (10) have been

found to contain breaches of warranty, two (2) of which are presently being dealt with by the Warranty Program. These homes are owned by Duford and Moreau.

3. Pursuant to the provisions of Section 8(2) of the Act, you have a record of breaches of warranties, TO WIT:
 - (a) The ten (10) homes referred to in paragraph 2(a) above were found to have breaches of warranty contained therein;
4. Pursuant to the provisions of Section 8(2) of the Act, you have a record of failure or unwillingness to complete performance of contracts, TO WIT:
 - (a) You have failed to complete the Martel/LeFrance purchase as set out in paragraph 1(b)(ii) above.
5. Pursuant to the provisions of Section 8(2) of the Act, you are in breach of terms and conditions of registration, TO WIT:
 - (a) In failing to comply with the Settlement Agreements as set out in paragraph 1(a) and (b) above, you have breached the terms and conditions of registration as agreed to by you and have further breached subsection 3 of Regulation 728;
 - (b) In failing to reimburse the Program for the amount paid out by it with respect to the Martel/LeFrance deposit refund claim as referred to in paragraph 1(b)(ii) above and the three (3) of the warranty claims (Bush, Wasson and Shastry) referred to in paragraph 2(a) above, you have breached the provisions of the Vendor/Builder Agreement and subsection 4 of Regulation 728;

- (c) In failing to perform your warranty obligations as set out in paragraph 2(a) above, you have breached the provisions of the Vendor/Builder Agreement and subsection 3 of Regulation 728;
- (d) In failing to provide the documentation and registration fee requested as set out in paragraph 1(b) above, you have failed to comply with subsections 3, 5 and 6 of Regulation 728 and subsection 10 of Regulation 726.

In the opinion of the Tribunal, the grounds in support of the Registrar's Proposal set forth therein have been fully and sufficiently established by the evidence set before us and the Proposal ought to be implemented forthwith. In the opinion of the Tribunal, the Applicant's officer, director and sole shareholder, Mr. Gordon J. Simpson is not, on the basis of his past conduct and upon the criteria set forth in the statute and by reason of his lack of technical competence and otherwise, a fit person to preside over or be a principal of any company or entity registered under this Act or to be a registrant under this Act.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal.

LESLIE FARKAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
D.H. MACFARLANE, Member

APPEARANCES:

LESLIE FARKAS, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 June 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Mr. Leslie Farkas, was the owner of a new home covered by the warranty established by and described in the statute. He had, within the proper time designated therein, notified the Warranty Program of a number of problems but by the time this case came on for hearing all had been cured by the builder save for the new homeowner's dissatisfaction with certain kitchen cupboards provided by the builder.

These were cupboards described in the material set before the new homeowner at the time of the execution of the contract of Purchase and Sale as "standard" and, at an additional price, the option was open to the purchaser or purchasers of new homes in this particular subdivision to "upgrade" from the "standard" model of kitchen cupboards to various levels of superior grade cupboards which were available at extra cost.

The Applicant's evidence was that the cupboards chosen by him, the cupboards described as "standard" provided at no extra cost, and, particularly, the doors fitted to them, were not of acceptable quality - i.e. of less than merchantable quality and made of defective material.

The Applicant set his case before us with great ability. The Tribunal has a great deal of sympathy for him. A stumbling block, however, which lies between the Tribunal's sympathy for the Applicant and its ability to help him by granting the Order sought, is this. The product in question, these kitchen cupboards, is manufactured in very great quantities and very widely distributed throughout the length and breadth of Ontario. There has been a great deal of investment put into the machinery, the dyes, the jigs, and whatever other things are used to manufacture them. If they are indeed of unacceptable quality, the Tribunal would be very greatly concerned and would wish to put an end to the continued use of them by builders in providing homes to members of the consuming public.

The Tribunal is prepared to take judicial notice of the fact that many products are offered in the market place in this Province which are of less than merchantable or acceptable quality and the consuming public is thereby victimized. This is deplorable and something we consider our business to put an end to whenever possible. However, the effect of a finding on the part of the Tribunal that these cupboards which are, as stated, manufactured and sold in large numbers and widely distributed throughout this Province, are deficient and defective would be to condemn this manufacturer's production of this product. This would produce extremely serious consequences and no doubt lead to further and additional litigation. We do not think that they would simply withdraw the product from the market at this stage; they would wish to test the proposition that the product is in fact of less than acceptable quality further tested.

We feel that the onus upon an Applicant who seeks an Order productive of such consequences is an especially heavy one. In this case, in his final submission, Mr. Farkas said "I hope I was able to give you enough information to make the decision sought."

To the contrary, we feel that in order to find ourselves in a position to make the Order sought, an Order which would amount to a finding that these cupboards are "defective" within the meaning of Section 13(1)(a)(i):

Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material...

the Tribunal would have required the expert evidence of somebody skilled and experienced in this area of consumer standards. Had the Applicant been able to provide such evidence, acceptable, reliable and expert evidence that these cupboards were less than of marketable quality, less than the acceptable standards of this Province, then the Tribunal would have been very much inclined to have acceded to the Applicant's wishes. But that onus, a very heavy one, was not in our opinion fully discharged.

The Tribunal is of the opinion that the options by way of settlement which were offered by the manufacturer, the Company, were reasonable and appropriate in the circumstances. The Tribunal further understands that such settlement options remain open and available to the Applicant. We understand that the Applicant will have the opportunity of availing himself of one of these options and we expect and understand that the work will be done within a reasonable time, that is to say, before the end of the current summer. If subsequent events should prove that we are mistaken in our supposition, this hearing might then be re-opened.

Subject to this and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MARILYN AND MURRAY FERGUSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
D.H. MACFARLANE, Member

APPEARANCES:

MARILYN FERGUSON, appearing on her own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 July 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Marilyn and Murray Ferguson from the Decision of the Warranty Program denying their claim for compensation arising from what they allege are structural defects in the home which they purchased on April 1st, 1985.

It is agreed that possession of the property took place as of April 1st, 1985 and that the first claim for relief was made September 26th, 1986. Therefore, the Applicants were beyond the one year warranty and it is incumbent upon them to bring themselves within Section 13(1) and Section 14(1)(b) and the Regulations thereunder for the relief sought.

The complaint involved three major cracks in the basement wall: one large crack in the east wall, a second large crack on the south side of the basement and a third large crack on the south side of the basement resulting in a complaint to the Ontario New Home Warranty Program which was received by the Program on September 30, 1986. Mr. and Mrs. Ferguson had these cracks repaired at a cost of \$900.00 but on April 6th, 1987, a further claim was made as a result of two additional major cracks appearing in the basement wall. There is evidence that water entering through the crack seeped into the basement making it virtually impossible for habitation. Both applications for compensation were denied by the Program resulting in this appeal.

While the Tribunal is aware of the number of applications brought for relief involving cracks in basement walls, and the weight of the decisions against them, it must reflect upon the consequences to each applicant and the true intent of the legislation.

We have the decision in the Kennedy case, 1982 11 C.R.A.T. which was quoted by the Tribunal in the case of Kenneth Earley 1986 15 C.R.A.T. at page 136, as follows:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

We have, on the other hand, the Gonzalez case, 1986 1 C.R.A.T. on page 144 which in our opinion is diametrically opposed in its principal to the Kennedy decision. Surely between these two positions there is a via media reflecting both a reasonable interpretation of the Act and justice for the Applicant.

One of the factors considered by the Tribunal is the fact that many of the people buying or building new houses today do so with the prospect and intention of using the basement as a recreation room or as the realtors wish to define it as a family room and the home is sold on the basis of the family room being available. When, however, this area becomes uninhabitable because of numerous cracks in the basement walls from which water either seeps or runs, its purpose has been defeated. The use of the house is now limited and the purpose for which it was intended unfulfilled. We have, as a result, families living in one-half or two-thirds of their houses but not in the whole house.

The question then arises, "Should a house be completely uninhabitable before the Applicants can bring themselves within the meaning of Section 13(1)(b) or Section 1(o)(ii) of the Regulations?" On the other hand, if the use for which the house was intended is limited, then to what degree must it be restricted to be considered as defective in workmanship or materials sufficiently to bring the owner within the legislation? In the present case, there is ample evidence of the intended use of the basement. The photographs introduced as exhibits clearly show that the spiral staircase leading to the basement and the construction of the fireplace

re designed as an integral and necessary part of the house. S. Ferguson, in her evidence, also stated that they intended to build an office downstairs but the entry of water precluded any possibility of its use.

Accordingly, the Tribunal holds that five cracks in the basement walls in this building constitute a major structural defect within the meaning of Section 1(o)(ii) of the Regulations.

By virtue of the authority vested in it under Section (3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim, compensate the Applicants and to rectify the problems complained of which the Tribunal deems to be a "major structural defect" forthwith.

GREELY CUSTOM HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
 UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
 TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
 KENNETH VANHAMME, Member
 WILLIAM W. WATSON, Member

APPEARANCES:

DAVID G. HEELEY, representing the Applicant

BRIAN M. CAMPBELL, representing the
 Ontario New Home Warranty Program

DATES OF	20, 21, 22, 23, 24 October, 1986	Ottawa
HEARING:	12, 13 May, 1987	Ottawa
	13, 14 July 1987	Toronto

REASONS FOR DECISION AND ORDER

The facts of this case, while unfortunate, are not overly complicated and may be summarized. Mr. Lafortune, the owner-operator of the Applicant Company, is a builder who carries on his medium sized construction business in the Ottawa Carleton area by means of two private corporations controlled by him one of which is the above-cited Greely Custom Homes.

Mr. Lafortune has spent all his working life since he was 19 as a self-supporting member of the construction industry. We believe, from what we have heard in evidence, that he is by and large a reasonably good builder. But he fell into very serious trouble and whether this was due to bad luck, bad judgment or stubbornness or ignorance or by the operation of extraneous forces it is difficult to say; that is not the issue before the Tribunal. Ours is merely to apply the facts as we find them to the Statute and to determine whether or not Mr. Lafortune, or the Company operated by him, is liable to the Warranty Program under the warranty provisions of this Statute as has been alleged by the latter in its Notice of Proposal. In the year 1982, in the course of its business in the home building industry, the Applicant acquired nineteen or more lots in a subdivision property within the limits of the Village of Metcalfe in the Township of Osgoode in the Judicial District of Ottawa-Carleton and proceeded to erect eighteen single family homes. The village of Metcalfe does not provide water or

verage services to its residents. Septic tanks and wells are the order of the day in that place. So Mr. LaFortune operating through his sub-contractors proceeded to install one septic system, consisting of a standard tank and tile bed, and one well for each home. His well-driller, whom he had employed on previous occasions, was Maurice Cayer.

Mr. Cayer drilled each of these eighteen wells for Mr. LaFortune at a cost agreed to between them and possibly did so to the best of his skill and ability. It was soon found, however, that these were not equal to the unsuspected and pleasantly surprising circumstances, circumstances of a hydro-geological nature, which were soon to reveal themselves.

For the bedrock, which lay some eight to ten feet beneath an over-burden of till, through which Mr. Cayer proceeded to drill his eighteen well holes to a depth of some ten feet to a most excellent aquifer which was capable of providing excellent pure potable water at a rate of 15 to 40 gallons per minute or more was fractured. That is to say, in addition to the common lateral strata between the layers, this rock had perpendicular cracks as well. This is not unusual. It was through these that the contents of the septic tanks, effluent, previously discharged into the tile beds, was conducted to the annular space between the well casing and the sealed, ungrouted well holes drilled by Mr. Cayer and thereby readily made its way down into the previously pure aquifer. This process continued through the summer of 1983 as the houses were sold and occupied, commencing when the first occupant of the first house flushed his toilet for the first time around June 1983 and continuing until early September 1983 when the aquifer was found to have a faecal count of 60, meaning that it was grossly (and, as events turned out, incurably) polluted, completely unfit for human consumption.

However, it was not immediately appreciated that the aquifer had been for all practical purposes and for the foreseeable future completely ruined. When the Warranty program through its inspectors and functionaries first arrived on the scene in September 1983, they concluded that a failure on the part of Cayer, acting on LaFortune's instructions or otherwise) to seal and grout the wells as specified in the subdivision agreement was the cause of the contamination because otherwise the effluent from the septic tanks would not have been able to pass down through the well hole into the aquifer. Eventually the problem was cured by closing all of the eighteen wells drilled by Cayer, seventeen which were conducting pollution into the aquifer and engaging a thoroughly

competent well drilling contracting firm, Olympic Drilling to drill eighteen new wells to a much deeper aquifer at the 110 foot level and below the aquifer which had been ruined. But before doing this, in an effort to find a simpler and less costly cure, the Warranty Program more or less induced Mr. LaFortune to have Mr. Cayer redrill five of the seventeen offending wells, sealing and grouting them in so doing. This exercise proved futile but the Applicant, responding to the Warranty Program's claim against it for complete indemnification of all monies laid out both in respect of the resolution finally adopted as well as the preliminary effort which proved fruitless, has sought to establish that its liability in the matter is limited, namely to the cost of the efforts initially proposed or prescribed by the Warranty Program (upon the advice of Mr. Smith, the expert hydrogeologist engaged by it). The Applicant says, in effect that, having taken the curative steps initially proposed by Warranty Program it then ceased to be liable notwithstanding that these curative steps failed to work and that much costlier and more expensive steps had to be taken in the end. The Applicant also attempted to suggest that the aquifer may have been contaminated by reason of other causes, a notion the Tribunal summarily rejects.

The Tribunal is satisfied that the aquifer which was penetrated by seventeen of the eighteen wells drilled by Mr. Cayer was irredeemably polluted by reason of these not having been drilled and constructed properly as would have been the case had the specifications been followed which were set out in the subdivision Agreement between the Applicant and the municipality at Section 38(0)(1). Moreover, we believe that the motive underlying Mr. Cayer's failure to seal and grout financially, being a simple impulse to do the job as cheaply as profitably as possible and to hazard the consequences. In this he quite probably was abetted by Mr. LaFortune, who probably would not have engaged him had he presented a tender at a considerably higher cost for doing the work properly by the sealing and grouting method. We have no doubt that Mr. LaFortune and Mr. Cayer may have constructed wells on previous occasions without sealing and grouting and with perfectly adequate results. In our opinion such well-drilling methods, if successful in certain instances, were fortuitously successful; successful, that is to say, more by good luck than by good judgment or, in other words, the result of lucky gambling.

It is trite and perhaps rather sanctimonious to point out that valuable resources like underground water deposits

coming increasingly precious and rare in this increasingly over-populated and depleted planet which we inhabit. Every generation in turn must more and more be acutely aware of its responsibilities towards its successors in respect of irreplaceable resources. Even Canada, relatively so rich in this resource, can no longer suffer with indifference the expropriations of uninstructed profit seekers who are willing to risk damage to what is the priceless common property of all.

In this case the pollutants negligently and recklessly introduced into a previously excellent and exceedingly copious underground water supply have poisoned it and rendered it useless to human needs for the foreseeable future.

What has happened is very serious and the Tribunal should be gravely at fault were it to communicate some impression to operators in this industry and to the public at large that it took any other view of it. It is the Tribunal's function to be just, and wherever possible to be generous as well. However, we must also consider the far-reaching effects of our decisions upon activities which will be going on in this Province in the future. It is very far from our wish or intention to give any impression that the kind of hit and miss gambling with irreplaceable resources which is implicit in the LaFortune-Cayer method of well drilling is to be condoned or lightly excused as would be the case were we to adopt a kind of "accidents will happen" or "it could have happened to anyone" sort of approach to our task in this case.

Messrs. LaFortune and Cayer had their eyes open when they addressed themselves to the drilling of these wells. We believe the decision to ignore the provisions of the subdivision agreement and to drill without grouting and sealing was a conscious one. We would like to be able to mitigate the financial blow (to the tune of over \$100,000) which now seems likely to fall. Perhaps we could do this where we decide that the Warranty Program had been reckless in its spending or had done unnecessary work, the cost of which could not fairly be assessed against the Applicants; or were we to find that the problem had causes at least in part outside the scope of the Applicant's responsibility.

We have reviewed the evidence with the greatest care. It has not been possible for us to persuade ourselves that the Warranty Program or its advisers, or at any time during the performance of their successive efforts to remedy the problem, acted other than prudently, responsibly and cost-consciously or that any other persons or agencies could have addressed

themselves with greater effectiveness or economy to the situation confronting the Warranty Program when it first stepped into this case, a situation which was caused not by an act of God, not by extraneous pollutions mysteriously arriving from outside, but which was the result of the Applicant's completely improper method of proceeding.

It follows that we therefore accept the evidence and argument adduced by the Respondent Warranty Program including the bulk of what was said by its expert witness and other witnesses, and reject, if not the sincerity at least the conclusions we have been invited to reach by the evidence and arguments set before us on behalf of the Applicant.

Section 13 provides:

- (1) Every vendor of a home warrants to the owner
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined in the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

The Tribunal holds on the evidence that the Applicant is liable under Section 13(1)(a)(i) in that the wells were not constructed in accordance with Section 6(1)(b) of Regulation 739 to the Ontario Water Resources Act as they ought to have been and they were not constructed in a workmanlike manner and as well, because of the insufficiency of the materials and that these were defective.

As well, the Tribunal holds the Applicant liable under Section 13(1)(a)(ii); the homes were clearly not fit for habitation inasmuch as they were not provided with potable drinking water.

Section 13(1) is a strict liability section; its provisions impose strict liability upon the builder who makes a warranty. This means a builder who offends or transgresses these provisions is liable in much the same way as is an insurer under a Contract of Insurance regardless of any consideration of fault or mitigating circumstance. This means that much of the evidence adduced by the Applicant was irrelevant and it means that the Tribunal has no choice, no discretion, no discretion to vary or set aside the Proposal on its stated terms.

In the Tribunal's opinion, the Proposal of the Registrar/President of the Ontario New Home Warranty Program should be carried out and the registration of the Applicant, as well as Mr. LaFortune's other company, Hy-Fortune Custom Homes Inc., and also any future company with which he is involved as an officer or shareholder shall be revoked (or refused as the case may be) unless within 30 days' of the issue of this Decision and Order, the full sum claimed by the Warranty Program in the said Notice of Proposal shall be paid to it in full, except for the sum of \$7,061.99 which was the cost of a well on the Whiting property. Both parties agreed that the well was never polluted.*

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Greely Custom Homes. The appeal had not been concluded at the time of this publication.

RAYMOND D. LANCTIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
STEPHEN PUSTIL, Member

APPEARANCES:

RAYMOND D. LANCTIN, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 June 1987

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing by way of appeal from the decision of the Ontario New Home Warranties Program (the "Program") disallowing Mr. Lanctin's claim made pursuant to Section 14 of the Ontario New Home Warranties Plan Act (the "Act").

Mr. Lanctin and his wife purchased their home, located in London, Ontario, from Reemark Limited, the builder and vendor thereof. They took possession of the home on September 21st, 1984, and made their original claim within the one year warranty period.

All but three of the items set out in the original claim have been resolved as the result of the Program's intervention and the vendor's co-operation. The three outstanding items are:

1. Leakage in family room near the fireplace.

Mr. Lanctin indicates that, following heavy rainfall, water has leaked into his family room and soaked the rug area in the vicinity of the fireplace. This, he says, has occurred on at least two or three occasions. Upon inspection by the Program's Inspector, Mr. Truman, no signs of water penetration such as water or rust stains or dampness were found although it had rained for one and one-half days prior to the day that the inspection was carried out. Mr. Vincent, the vendor's

representative, testified that he also inspected this area and found no evidence of water leakage. Mr. Lanctin was unable to specify when the alleged water leakage had last occurred. There was some evidence suggesting that any leakage problem might have existed in the past was corrected once certain repairs were carried out to the driveway. Based on the inconclusive evidence before it, the Tribunal is unable to find that any breach of the statutory warranty has occurred and this claim is therefore disallowed.

Bathroom Skylight

The bathroom skylight was offered by the vendor as an option. Mr. Lanctin and his wife chose this option after viewing the bathroom skylight in the model home that they viewed. The original skylight leaked and attempts to repair it were unsuccessful. The vendor then replaced the skylight three times. The leakage problem appears to have been corrected by the final installation. The final model installed was described by Mr. Vincent as being a definite upgrade from the original model. While Mr. Lanctin stated that he was "not sure" whether any further leakage has occurred, the report which he submitted to the Tribunal, prepared by his consultants, Cashmore Consulting Group Inc., states that "there are no apparent leaks at present." Mr. Truman found no evidence of leakage on his inspection and Mr. Vincent, after testing the skylight by hosing it down with water from the roof, found no indication of any water penetration.

Mr. Lanctin also complains that the skylight that is installed in his bathroom does not look like the one he saw in the model home. He feels it has "too much wood" and finds it to be unattractive. The nature of these complaints are not within the ambit of the warranty provided under Section 13 of the Act.

Mr. Lanctin also produced evidence in the form of photographs which show that mold has formed on the woodwork surface. These photographs also show that there has been some water damage to the surrounding drywall. Based on the evidence, it would appear that the mold is the result of condensation occurring in the bathroom. The damage to the wall may be the result of prior water leakage and/or condensation. The vendor had previously indicated that it would be prepared to clean-up and repaint the interior skylight area (even though this was not required by the Program). At this hearing, Mr. Vincent confirmed that the vendor would still be willing to carry out this work.

The evidence is inconclusive as to whether the installation of a more powerful fan or the relocation of the fan would reduce the amount of condensation forming on the skylight glass. The present fan is of a standard size and type commonly installed in residential bathrooms. It is operating properly and is not defective.

There is no evidence before the Tribunal with respect to this item that would indicate that there has been any violation of the Ontario Building Code. The bathroom is being used and is functional. There is no evidence suggesting that the condensation is the result of anything other than normal bathroom use. There is no evidence of defective materials or poor workmanship. In summary, the evidence does not support finding that there has been a breach of the Section 13 warrant and this claim is therefore disallowed.

Once the appearance of the interior skylight area has been restored by the vendor pursuant to its undertaking, it will be necessary for the owners to take steps to remove excess condensation from time to time in order to maintain the skylight area in a clean and attractive state.

In his argument at the conclusion of the hearing, Mr. Lanctin raised what is, in effect, a separate item of complaint although arising as the result of the skylight replacement. The complaint relates to the appearance of the roof area near the skylight, which area was patched when the skylight was replaced. Photographs put before the Tribunal would indicate that there is some merit to this complaint. However, as this matter was not raised until the conclusion of the hearing, as the witnesses were not given an opportunity to comment on this complaint, and as the matter was not specifically addressed by the Program in its decision, the Tribunal is not prepared to make any finding in this regard. The Tribunal does, however, suggest to the vendor that it make some effort to improve the appearance of this roof area as a gesture of goodwill.

3. Garage Floor Leaks

Mr. Lanctin's third complaint is that water runs through his garage particularly after a heavy rainfall or spring thaw. The garage in question was built as an extra by Reemark Limited at Mr. Lanctin's request. The relevant schedule to the Agreement of Purchase and Sale for the property refers to the garage and sets out some details as to the type of construction to be utilized. The garage is of a detached

me type on a concrete floating slab with no foundation or footings. The floor has heaved and cracked in the past. The Tribunal was advised that this type of garage slab is particularly susceptible to frost action and resultant cracking. The concrete has been patched but some other cracks have occurred. In attempting to remedy the water leakage problem, the vendor took steps to reslope the surrounding grade away from the garage. The grade on the south side of the garage was addressed by installing a weeping tile over to the east side yard and down to the street. The vendor also created a berm so as to force any ground water towards the weeping tile. This berm was removed by Mr. Lanctin when he installed a flower bed at the south and east sides of the garage. While the evidence is not conclusive, there is some indication that the removal of the berm and the installation of the flower bed may be contributing to the leakage problem. The adjacent soil is higher than the garage slab and the metal installed by the vendor against the garage siding along the length of the flower bed creates an opening where water can collect and seep into the garage.

The vendor has indicated to the Tribunal that it is prepared to install waterproofing along the rear of the exterior of the garage at the point where the concrete pads meet the wall.

The garage shows no signs of structural failure. The cracking of the floor slab is common to this type of construction and has not effected the structural integrity of the building. The Tribunal accepts Mr. Truman's view that it would not serve any purpose to put a further topping on the slab as this would likely crack as well.

In result, based on the circumstances and the vendor's undertaking to do the waterproofing mentioned above, the Tribunal disallows this item as well.

In summary, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim in its entirety.

MRS. ANNA LEONE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
JOHN HURLBURT, Member

APPEARANCES:

CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 14 July 1987

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. The Applicant was given notice of the Appointment for Hearing the 11th day of June, 1987, as evidenced by Exhibit 2 which contains the further notice:

"if you do not attend at the hearing the
Commercial Registration Appeal Tribunal
may proceed in your absence and you will
not be entitled to any further notice in
the proceedings."

2. The Applicant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

LD J. MILKAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

UNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
LOUIS A. RICE, Member

ARANCES:

JAMES S.B. WHEELER, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

OF

ING: 3 July 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Ronald J. Milkau, purchased a property principally known as 104 Rachelle Court in Woodbridge which had to be completed from Packard Development Corporation, the order.

They took possession July 25th, 1985, as stated in the Certificate of Completion under the Ontario New Home Warranty Program. The Certificate is dated November 28th, 1985.

After taking possession, the Applicant entered into an agreement with Packard Homes Limited dated March 27th, 1986, which was received by the Program on July 24th, 1986. The agreement reflected Mr. Milkau's opinion of the quality of Packard's workmanship since part of the consideration for the agreement was Milkau's undertaking to remove a sign on the property alluding to his complaints about Packard Homes and Packard undertook to complete or repair some 33 items which was estimated to cost some \$9,810.00.

As a result of Packard's inability or unwillingness to complete the work, Milkau notified the Program by courier in a letter received by the Program on July 24th, 1986, attaching to the letter, the Packard agreement of March 27th, 1986, together with the list of unfinished items and a further list of complaints.

The Program, in an attempt to resolve the problems, had inspections made on August 15th and 18th, 1986, and the Inspectors, Messrs. Rose and Bourne mailed their recommendations to Milkau on September 4th, 1986. As a result of the Conciliation Report, the Program then attempted to complete the work recommended by the report and entered into contract with Barry J. Bull Enterprises Inc. for the work to commence November 27th, 1986. The contract was completed by Bull on the 21st day of January, 1987, and the Company was paid the sum of \$3,850.00.

Since, however, some of the complaints were rejected by the conciliator, the Applicant submitted a list of 19 items through his solicitors, on March 6th, 1987. These were addressed by Mr. John D. Lowood on behalf of the Program in a letter to James S.B. Wheeler, counsel for the Applicant, which reads in part as follows:

Dear Mr. Wheeler:

Re: Milkau purchase from Packard
Development Corporation

Thank you for your letter of March 6, 1987. I am disappointed to read that Mr. and Mrs. Milkau are unhappy with the performance of the Warranty Program in spite of our contractor having rectified a significant number of items. The list provided with your letter includes a number of items which were not considered warranted while several new items have been listed which appear to be beyond the first year.

It is the decision of the Warranty Program under Section 14 of the Ontario New Home Warranties Plan Act that the Warranty Program has carried out its responsibilities in respect of the residence. The decision may be appealed.

On March 26th, 1987, the Program was advised by Mr. Wheeler that his clients wished to appeal the decision set out in the letter of Mr. Lowood. The appeal was subsequently filed and the 19 items became the subject of the Tribunal's consideration.

Evidence was given by Mr. Milkau reciting his complaints and by Messrs. Rose and Bourne, Inspectors for the Program, who had attended at the premises to consider specifically each of the 19 alleged omissions or deficiencies. Further witness, John Wright, Inspection Supervisor for the Town of Vaughn, was called by the Program concerning the grading of the lot. After hearing their evidence and considering the exhibits filed by both parties and hearing the submissions of both counsel, the Tribunal finds:

There is no evidence of any defect in the sump drainage pipe constituting Item 1 and accepts the evidence of Inspector Kenneth Rose, that the pipe extending approximately three feet from the house foundation provides for adequate discharge of the drainage system.

The second complaint involved the electrical wiring to the driveway light which was buried. The Inspector was unable to determine its length or termination point. He observed, however, that he was not made aware of any defect in the wiring and the final installation of the light fixture was not part of the builder's work. The Tribunal, therefore, rejects the applicant's claim.

From the photographs produced as exhibits and from the evidence, Item 3 does not appear to be defective and the Tribunal finds no evidence of any repair required.

The fourth complaint involved improper back fill and evidence was given by Mr. Wright that the grading of the lot had not been completed according to the Town's satisfaction, but it was his understanding that the developer was looking after it. The Tribunal notes also that the grading is covered by the subdivision agreement. The Program Inspectors, however, pointed out that work had been completed by the Warranty Program's contractor to ensure that the back fill was proper and observed that if problems should continue to be experienced, the Program would call upon the contractor to make the necessary corrections. They further observed, however, that there was no problem reported to them as a result of his work.

We can, therefore, find no evidence that the work done by the Program's contractor was defective and the Tribunal, therefore, rejects this claim.

Item 5 on the list was a complaint of paint peeling and it was noted by the Inspector that there was minor paint

deterioration which was considered to be as a result of normal wear and tear and, therefore, excluded under Section 13(2)(c) of the Act. The Tribunal finds accordingly.

A further complaint involved damage to the steps and walk and the Tribunal finds as a fact that some damage had occurred as a result of the Program contractor's work and, therefore, the Tribunal orders the Program to make the necessary repairs.

Number 7 on the Applicant's list was a complaint of missing screens. The Tribunal cannot find any evidence that the screens were damaged by the Program's contractors and, therefore, the claim is rejected.

Items numbered 8 and 9 involved sod damage and the report of the Program's Inspector points out that if damage was caused by the Program contractor and remains unrepaired, it will be looked after by the Program. Although the evidence was somewhat vague concerning the extent of sod damage, the Tribunal finds that some repair is required as a result of damage caused by the Program's contractor and orders the Program to make the necessary repairs.

The tenth item was a complaint about the interior paint. Although the Program has taken the position that this was reported after the first year warranty period, the Tribunal is unable to find any evidence of damage to the interior paint with the exception of the items on which further comments will be made.

The Applicant introduced as an Exhibit, certain photographs of the basement floor. It appears that the floor had been repaired and an attempt made to touch up the paint. This does not meet his satisfaction and despite the evidence the Inspectors that it was reasonable and workmanlike, the photographs disclose that the paint has been patched rather than the floor completely repainted. The Tribunal, therefore orders the Program to complete the painting of the Applicant's basement floor.

The stairs to the lower level which form the subject of the twelfth complaint were inspected by the Program's witnesses and their evidence was that the surface marks on the step were simply the result of normal wear and tear. This claim is, therefore, rejected.

The thirteenth item addressed a water leakage into t

sement and the Program's Inspector observed that if there was y further leakage due to the Program's repair contractor's rk, any further repairs will be done as required. The ibunal, therefore, directs the Program to make the necessary pairs if required.

Further paint repairs to the wall which form the bject of the fourteenth complaint are not in the opinion of e Tribunal proven as necessary. The evidence does not bstantiate the claim and the Tribunal accepts the opinion of e Program's Inspector that the paint touch ups seems to be asonable and workmanlike.

The fifteenth item concerning the exercise room iling does not appear to have been reported during the first ar's warranty and the Tribunal rejects this claim.

With respect to Item 16, the Applicant testified that e sliding doors were defective in that they were hung ckwards which was interpreted to mean that the door opened om the wrong side. The Inspector, however, pointed out that iding doors can open either from the left or from the right d that the subject doors were hung correctly. The Tribunal epts this evidence but also accepts the evidence of Mr. lkau that the doors do not lock properly and directs the ogram to make any repairs required to ensure that the eective lock is replaced to the satisfaction of the Applicant.

The Tribunal accepts the evidence of the Inspector ncerning the seventeenth complaint of the kitchen floor being even. The Inspector could not identify any substandard aterial or workmanship, nor was any code violation observed. e appears, although the Offer to Purchase was not introduced evidence, that under his contract with Packard, Mr. Milkau s to complete the covering of the kitchen floor. The ibunal, therefore, rejects this claim.

With regard to the laundry room wall, the subject of em 18, the Tribunal finds no evidence of substandard nstruction and, therefore, rejects the claim.

The final item concerned the ceiling paint in the nily room and is, in the opinion of the Tribunal, a asonable request by the Applicant. We find on the evidence at the original builder touched up paint at various places d a proper inspection must disclose different shades of paint the ceiling. The Tribunal, therefore, directs the Program repaint the ceiling of this room.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to reject the Applicant's claims number 1, 2, 3, 5, 7, 10, 12, 14, 15, 17 and 18 and to allow claims number 4, 6, 8, 9, 11, 13, 16 and 19 and to compensate the Applicant or to rectify the problems on which the Tribunal finds on the evidence have been proven.

R. AND MRS. TERRY MOORE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

RIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MACFARLANE, Member

PEARANCES:

GEORGE SANDS, as agent and
and DR. TERRY MOORE, on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

ATE OF
EARING: 28 July 1987 Toronto

REASONS FOR DECISION AND ORDER

By letter dated January 15th, 1986, Dr. and Mrs. Moore made a claim for damages arising out of defects in the marble and ceramic tile flooring in their home against the Ontario New Home Warranty Corporation. Since the Moores took possession of their home on January 18th, 1985, it would appear that their claim was filed within the first year of the warranty period. However, the letter shows a date stamp of January 30th, 1986, and it is the position of the Corporation that the claim has not been made within the first year. In the Corporation's opinion, the cracks in some of the marble and ceramic tiles do not constitute a major structural defect and the claim has been denied by its decision dated May 14th, 1987. The Applicants now appeal that decision.

When the Moores purchased their home, they substituted travertine marble tile for the proposed ceramic tile in the entrance hall, main foyer and powder room. Ceramic tile, in accordance with the original plans, was used in the kitchen. A number of marble tiles have now developed cracks, as have some ceramic tiles. The cracks were described in the hearing by the Corporation's witnesses as 'hairline' and by Dr. Moore and his witnesses as somewhat wider, although none of the cracks were apparently actually measured. According to the sketch filed by the Applicants, there are four separate series of cracks totalling some 48 feet in all.

The issue for this Tribunal to decide is whether the defects are covered by the warranty provided in the Ontario New Home Warranties Plan Act.

In his detailed report to the Moores dated January 20th, 1987, Sean Hart, a civil engineer retained by the Moores to examine and report on the causes of the cracking of the tiles, outlined the 1983 Building Code requirements for flooring, subflooring and underlay. It appears that where specifications for subflooring and underlay were provided in the Building Code, they were met, although Mr. Hart made it quite clear in his testimony and his written report, that the minimum standards set out in the Code were inadequate for marble tile flooring. Mr. Hart also pointed out two other minor breaches of the Building Code which he suggested may have contributed to the cracking of the tiles.

In his written report, Mr. Hart summarized his conclusions as follows:

It appears as if the ground floor structural system has not met certain structural requirements of the 1983 Building Code standards set out by the Terrazzo, Tile and Marble Association of Canada. Because of these structural deficiencies, undue differential sagging of floor joists has occurred resulting in the cracking of expensive marble and ceramic tile floor finishes. It appears as if the contractor has attempted to use conventional wood frame floor construction (albeit inadequate) without taking into account certain requirements for ceramic and marble tile floors outlined above. It is my opinion that the structural floor system is inadequate as installed to support brittle finishes such as ceramic and marble tiles without cracking appearing in a number of areas, and is therefore a serious structural deficiency.

Tibor Pal, an engineer called by the Corporation, did not disagree with the Hart report findings that the cracks in the marble tiles were the result of 'differential deflections'. He attributed the cracks in the ceramic tiles in the kitchen new partitions placed in the basement by the owner. In his report dated April 1st, 1987, Mr. Pal noted that the Terrazzo

Tile and Marble Association of Canada recommendations are not referred to and do not form part of the 1983 Ontario Building Code. It was his conclusion that the floor construction of the Moore home meets the requirements of the 1983 Building Code; that the cracks in the tiles are the result of differential deflections and the new partitions placed by the owner in the basement; that some of the cracks are due to weakness in the marble itself; and that any deficiency in the materials or workmanship did not constitute a major structural defect. However in his testimony, he did admit that if the house was being built for himself, he would have reinforced the floor to take the additional load of the marble tile and to provide greater rigidity.

Also filed with the Tribunal was a letter from the Executive Director of the Terrazzo, Tile and Marble Association dated July 27th, 1987, which states that, "By visual observation we noticed a crack appearing in the travertine tiles and it is our opinion that this crack was caused by deflection or movement in the floor." The letter goes on to say that "the installation is good and well within the standards of the industry."

Assuming, but not deciding, that written notice of the defective tiles was given to the Corporation within the first year, the applicable provisions of the Ontario New Home Warranties Plan Act are Section 13(1) and 13(2). The Tribunal is satisfied that none of the exclusions referred to in Section 13(2) apply in this case. The Tribunal is also satisfied that the Moore home is constructed in a workmanlike manner and is free from defects in material; that it is fit for habitation; and that, with a minor exception, it is constructed in accordance with the 1983 Ontario Building Code. It is to be noted that this Code contained no standards for marble flooring in residential buildings.

The Tribunal finds that the cracks in the marble tiles have occurred in part because of the inherent brittle nature of the tiles themselves but primarily because of the uneven underflooring. There was little direct evidence given with reference to the ceramic tiles in the kitchen, but the Tribunal assumes the cracks occurred for similar reasons. There was no evidence that any of the tiles were defective. On the evidence before it, the Tribunal cannot find that the cracks in the tiles were caused by the failure to comply in all respects with the Building Code. The Tribunal also rejects the Corporation's contention that the partitions installed in the basement by the applicants at a later date contributed or caused the deflections in the flooring.

Regardless of whether the Applicants' claim was made within the first year or not, the Moores must satisfy the Tribunal that a major structural defect exists. The cracks the tiles occurred within the first six months of occupancy and no further cracks have occurred since. There was no evidence to show that the load bearing function of the floor has been adversely affected. Although the Tribunal accepts that the floor is not level throughout, the condition described does not amount to a serious distortion of the floor structure. The condition, in the Tribunal's opinion, is primarily an aesthetic defect and does not compromise the structural integrity of the house.

It was argued that since the Moores entertain a great deal in their home, the flaws in the marbled flooring materially and adversely affect the use of the home for the Moore's purposes. The Tribunal rejects this standard. The dwelling was intended for usual residential use. The cracks the marble tile and the ceramic tile may be cosmetically unattractive, but there was certainly no evidence to indicate that these defects rendered the home unsuitable or unsafe for entertaining guests or for the owners themselves.

Thus, based on the very narrow definition of 'major structural defect' contained in the Regulation to the Act, the Tribunal is unable to allow the claim.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

. AND MRS. RONALD POMEROY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

IBUNAL: STEPHANIE J. WYCHOWANEC Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
LOUIS A. RICE, Member

PEARANCES:

BARRY G.A. MacDOUGALL, representing the Applicants

CAROL A. STREET, representing the
Ontario New Home Warranty Program

TE OF

ARING: 3 June 1987

Toronto

REASONS FOR DECISION AND ORDER

The facts in this appeal are not in dispute. In September, 1984, Ronald and Lillian Pomeroy, the Applicants herein, entered into a construction contract with Van Leyden Construction Inc. for the construction of a house in Peterborough. The construction of the residence at a cost of \$4,000, was to be substantially completed by November 15th, 1984. Beginning December 17th, 1984, the Ontario New Home Warranty Program (the 'Program') received a series of complaints regarding alleged defects in construction. In all there were some ten breaches of warranty as found by the Program. There were attempts to have the builder rectify the defects and initially the Program denied the claim because of a holdback retained by the Pomeroyes. It is now agreed that the work is to be completed by another contractor at a cost of \$2,075. The Program has paid \$2,133 to the Pomeroyes, being the difference between the costs of repairs and the holdback of \$3,942. The Pomeroyes' claim that their holdback was depleted \$3,500, which was the amount owing to their solicitor for his services, rendered first in pursuing the builder and then the Program, for redress.

The issue before the Tribunal is whether the legal expenses incurred by the Pomeroyes in this matter are recoverable under the Ontario New Home Warranties Plan Act.

Mr. MacDougall, counsel for the Pomeroy's, argued that the legal expenses were directly related to the original breach of contract by the builder. It was his contention that the application for reimbursement should not be viewed as an application to award legal costs, but as one to recover expenses incurred in the course of getting a defect in workmanship repaired. It was his position that if the builder was sued in the courts, these legal expenditures would be part of the damages claimed. Instead of going to the courts, his clients have turned to the Tribunal under Section 14(1)(a) of the Act.

Ms. Street argued that the Program is not an insurer and that the Pomeroy claim could only be brought under Section 14(1)(b) of the Act, since the claim was not one related to an incomplete residence but one dealing with defects in construction. She said the Program's obligation is only to correct the defects and not to indemnify the purchaser for all costs. She also pointed out that since there was no specific authority given to this Tribunal to award costs, the Tribunal had no jurisdiction in this application.

In reply, Mr. MacDougall reiterated that the authority or lack of it, to award costs was irrelevant because his clients were not asking for the costs related to attendance before this Tribunal. He said the expense of \$3,500 was directly related to the breach of the construction contract. By having to pay legal fees to enforce their claim, the Pomeroy's suffered a financial loss as a result of a breach of warranty.

The Warranty provided by the Ontario New Home Warranties Plan is spelled out in Section 13 of the Act. The exclusions to the warranty are also set out therein. There is no mention anywhere of legal costs incurred in the course of enforcing the warranty.

Although Mr. MacDougall submitted that the claim falls within Section 14(1)(a) of the Act, it is the opinion of the Tribunal that the claim must be made within Section 14(1)(b). The construction contract was performed and the Pomeroy's were 'owners' of the house. As owners, they have a cause of action against the vendor for damages resulting from a breach of warranty. Clause (b) provides that the owners are entitled to be paid out of the guarantee fund "the amount of such damages." The wording in Section 14(1)(b) appears to provide narrower entitlement than under Section 14(1)(a) which refers to recovery for "financial loss."

The term "damages" is not defined in the Act, however, the Tribunal takes the usually accepted meaning of the word as compensation given to a person for the wrong that another has done him. Damages are generally intended to place a person, so far as money can do it, in the same position as if the wrong of which he complains had not occurred.

In the law of contracts, damages are not awarded for all losses resulting from a breach of contract. Some losses are regarded as too remote, others are excluded from consideration by law. The question of remoteness arises when one has to decide for what part of his loss an aggrieved person is entitled to be compensated. In general, compensation is for foreseeable loss. The allowable damages should be such as may be fairly and reasonably considered either arising naturally from a breach of contract or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach. In the absence of any direction in the Ontario New Home Warranties Act on the question of quantum of damages, the Tribunal believes it is reasonable to be guided by these principles.

In reaching its decision, the Tribunal has asked itself two questions - firstly, what are the damages which actually resulted from the breach of warranty, and secondly, are there any special circumstances relating to the statutory warranty that must be taken into account.

In answering these questions, the Tribunal must refer back to the intent of the statute and the provisions of the statute itself.

The intent of the Ontario New Home Warranties Plan Act is to insure that buyers of new homes (this includes a person who owns property and who contracts with a registered builder to build a home for him on such property) are protected against financial loss up to a specified maximum because of defects in workmanship or materials, or major structural defects as defined in the regulations. Although the procedures are not fully spelled out in the Act, where there are defects, the owner is obliged to inform the builder to take corrective action. The owner must also inform the Program, in writing, of the defects and also if corrective action is not taken.

Section 17(2) of the Act provides that in the case of a dispute between a vendor and owner arising out of a contract

"neither party shall commence any proceeding in respect thereof until after fifteen days after the party notifies the Corporation of the dispute for the purpose of giving the Corporation an opportunity to effect conciliation."
(emphasis added)

The vendor's warranty to the owner is spelled out in Section 13(1) of the Act. Exclusions to the warranty are to be found in Section 13(2). One of the exclusions is "secondary damage caused by defects such as property damage and personal injury." Under the overall scheme of the Act, the fund established under the Act stands in the shoes of the vendor and the owner is not obliged to take legal action against the vendor to recover damages for breach of warranty prior to turning to the fund. The owner is entitled to look directly to the fund rather than the vendor for compensation resulting from a breach of warranty once the vendor refuses or cannot rectify the defect.

The Program points to the exclusion to the warranty referred to above and maintains that the legal expenses are excluded as being "secondary damages." The Tribunal does not agree with this interpretation.

In reaching its decision, the Tribunal differentiates between those legal costs incurred by the Pomeroyes in dealing directly with the vendor in pursuing their claim for breach of warranty and the cost incurred in dealing with the Program. It is the Tribunal's opinion that legal expenses incurred by an owner who chooses to pursue the vendor rather than availing himself of the provisions of Section 17(2) of the Act, ought not to be allowed since such expenses would not naturally arise from the breach of the statutory warranty, nor could they be supposed to have been in the contemplation of the Legislature at the time the legislation was enacted.

While the Tribunal might take a different view about reasonable legal expenses incurred by an owner in a dispute with the Program itself relating to the statutory warranty, the fact remains that this Tribunal has no jurisdiction to award costs. Counsel for the Pomeroyes attempted to segregate the legal costs to those incurred prior to launching an appeal to this Tribunal and those incurred in presenting the appeal, and

categorize the former as damages and the latter as costs. However attractive this argument may be on the surface, the Tribunal believes that all the legal costs for necessary, relevant and useful services incurred in establishing what the claimant should pay are encompassed in the term "costs", and not just those relating to the preparation for and appearances before this Tribunal.

The Tribunal is not prepared to accept the distinction proposed by Mr. MacDougall for purposes of circumventing its lack of jurisdiction, no matter how sympathetic it is to the claimants, and no matter that had this issue been before the Tribunal, these costs would likely be recoverable.

The Tribunal concludes that it has no jurisdiction to award costs in the circumstances of this matter. The claim is therefore disallowed.

MARK TEITELMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., Chairman, Presiding
DR. STUART E. ROSENBERG, Member
D.H. MACFARLANE, Member

APPEARANCES:

MARK TEITELMAN, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 12 June 1987

Toronto

REASONS FOR DECISION AND ORDER

In March, 1983, Mark and Fay Teitelman agreed with Sandbury Building Corporation to purchase a house to be built for them at a price of \$190,000. Initially the home was to be substantially completed by August 31st, 1983, but as is often the case, the Teitelmans did not obtain possession until October 7th, 1983. It was their uncontradicted evidence that even with the delay, the house was not finished and much exterior and interior work remained to be done. The Certificate of Completion and Possession contained two pages complaints of work either not completed at all or completed in a sloppy or shoddy manner.

Within the first year, numerous complaints were made to the builder. In a letter dated June 12th, 1984, to Sandbury, the Teitelmans listed some 35 items, some serious, some minor, that required corrective action. In a letter dated October 5th, 1984, a copy of which the Program denies receiving, the Teitelmans again, writing to the Builder, showed the same 35 items as outstanding and had added to the list of defects another 30 or so items.

It was evident from the testimony that Sandbury had made efforts to correct the problems or deficiencies, but as quickly as one item was corrected, another defect came to light. Indeed, some of the problems complained of later arose as a result of efforts to correct earlier flaws. In any event

October 14th, 1986, it appears that the majority of the problems had been satisfactorily dealt with by Sandbury. However, some 29 items were listed in the letter to the Program at that date. Of these 29 items, some 13 were now problems which were reported to the Program beyond the first year warranty period. The relief sought by the Teitelmans was set out in a letter to the Registrar of this Tribunal dated May 14th, 1987. Being totally dissatisfied with Sandbury's efforts, they claim financial recompense in the amount of \$10,080 for the following:

Ceiling height payment	\$1,000
Hudac fee	430
Garage door	150
all other items	3,500

It was the position of counsel for the Program that those defects which were reported beyond the first year of possession were not major structural defects as defined in the Regulations and, therefore, were not warrantable. It was also for submission that the defects which had been reported to the Program within the first year had been corrected to acceptable standards and that no further work needed to be done.

The frustration, exasperation and disappointment felt by the Teitelmans in not having the quality home they expected was clearly evident in their testimony. The builder's representative, Mr. Welles, had similar feelings in that he believed that Sandbury had done everything that needed to be done and that the Teitelmans were being unreasonable in their expectations and demands. The root of the problem seems to be that what Sandbury sold was a standard subdivision house, operating by and large only the minimum standards of the Ontario Building Code and what the Teitelmans thought they were buying was a quality custom built home.

Before dealing with the specific complaints, the Tribunal wishes to reaffirm several findings or guiding principles which were made by it in previous decisions. The first is that the Program must be informed of any claims against the Fund within one year and that written notice given to a builder but not the Program is not sufficient compliance with the statute. Only a claim based on a major structural defect, as defined in the Regulations is excepted from the rule. (Robitaille, 12 CRAT, p.201) Secondly, there is no obligation on the part of the Program to go beyond the Ontario Building Code requirements and standards. (Williams, 10 CRAT, 117) Thirdly, the statutory warranty is limited to

"contruction in a good and workmanlike manner." Defects not arising out of construction such as painting or sod laying are not covered by the warranty. (Levine, 12 CRAT, p.143) Finally the onus is on the owner to satisfy the Tribunal that a warranty has been breached and that the owner had complied with the requirements imposed on him by the statute. (Levine, 12 CRAT, p.148)

The owners have filed copies of numerous letters addressed both to the builder and to the Program. The letter of July 30th, 1984, addressed to the builder, was copied to the Program and evidently received by both parties. The letter dated October 5th, 1984, to the builder was not copied to the Program and the latter denies receiving it. It was said that this letter was used by the inspectors of the Program in late inspections of the house. However, whether or not the letter was used as a checklist is immaterial. On the evidence before it, the Tribunal is not satisfied that the Program did in fact receive the letter of October 5th, 1984. Therefore, unless the items now complained of were referred to in earlier correspondence, i.e. prior to October 7th, 1984, or unless the defects are major structural defects, they are not covered by the warranty.

The Teitelmans called no expert witnesses to support their claims relating to inadequate insulation, lack of alignment in the bay windows and so on. On the evidence before it, which is essentially that of the Program and the builder, the Tribunal is satisfied that none of the defects complained of in the letter of October 14th, 1986, fall into the category of major structural defects.

At the date of the hearing, the following items were outstanding and had been reported to the Program within the first year:

- (a) lack of urethane on handrails and pickets on second floor;
- (b) crack in oak nosing on second floor;
- (c) floor squeaks on the second floor;
- (d) insufficiency of stucco or stipple on ceilings
- (e) water hammer in main bathroom;
- (f) new brackets and proper paint for kitchen painting shelves;
- (g) insulation poor in alcove;
- (h) problem with direction of door swing in garage
- (i) defective front door bell;
- (j) lack of heat duct in upper hall.

In its Conciliation Report dated June 25th, 1985, the program inspector found that item (h) was covered under warranty. Since the Teitelmans paid to have this problem corrected, the cost is to be reimbursed. The repairs made in connection with items (b) and (c) appear to meet industry standards. Similarly, the light stipple or stucco on the ceilings meets normal subdivision standards and shows no defect in materials or workmanship. Item (g) was found warrantable in June 25th, 1985. It was not clear from the evidence that this problem has been rectified. If it has not, the warranty applies.

Items (a) and (f) are not covered by the warranty provided in the Act. There was no evidence that the water hammer, Item (e), was caused by faulty workmanship or defective materials. The doorbell referred to in Item (i) was apparently repaired once but broke again. Regardless it is not a matter covered by the warranty. There was no evidence that a heat meter referred to in Item (j) is required by Building Code standards.

The Tribunal has no authority to deal with the contractual dispute related to the alleged failure by the builder to provide a higher ceiling although the Teitelmans paid \$1,000 extra for this building specification change. The Tribunal also lacks authority to order a refund of the registration fee of \$430.

Although the Tribunal cannot grant the full relief sought by the Teitelmans, it is of the opinion that the builder, Sandbury, has not fully lived up to its own warranty incorporated in the Agreement of Purchase and Sale, which is broader in scope than the Program's. The Tribunal accepts that Sandbury made efforts to correct and did correct many of the defects complained of. Nevertheless, there seems to be a number of problems, such as failure to provide a proper key which could have been corrected, in the spirit of the builder's warranty at very little cost, and that these measures would have gone a long way in satisfying the Teitelmans. The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house, new or old, is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonably acceptable levels. The limited warranty provided by the Ontario New Home Warranties

Plan Act recognizes these facts, and this Tribunal is obliged to make its findings in accordance with the statutory provisions and not otherwise.

Therefore by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to reimburse the Applicant in the amount of \$150.00 and to correct the insulation problems in the alcove if it has not been properly rectified to this date. In all other respects, the Tribunal directs the Program to disallow the claim.

VERA

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

BUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
D.H. MACFARLANE, Member

EARANCES:

EUGENE TRASEWICK, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

E OF

RING: 6 August 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Dan Vera, was the owner of a new home granted under the Act and enrolled September 26th, 1985, and complaint concerned the brickwork or brick veneer with which that home was clad. This brickwork was the subject of a Conciliation Report dated October 8th, 1986, and a second Conciliation Report dated March 25th, 1987.

The first such Report made by the Warranty Program's Director, P.M. Poirier, reads in principal part, as follows:

OBSERVATION - An inspection of the exterior masonry revealed the following:

- a) the brickwork in question is a calcite brick with a rough textured finish,
- b) there are a number of these brick that have a smoother finish and which give the appearance of being a lighter shade, the most notable of which appears as a distinctive layer across the front elevation at and above the bay window,
- c) a good number of the head and bed joints in the masonry are porous from being improperly filled or from shrinkage

of the mortar around the brick and are to be found on all four elevations,

d) there is some inconsistency in the thickness of both the head and bed joints and in particular the head joints below the front bay window and the rear window adjacent the sliding doors as well as the chimney,

e) there are stress and step cracks in at least three areas the most severe being above the garage roof,

f) the vertical application of the brick varies somewhat from the plumb line at the northeast and southeast corners and the chimney, thus giving the appearance of being uneven,

g) that portion of the chimney above the roof line is plumb, but somewhat turned in relation to its base,

h) the colour of the mortar in the area of the different textured bricks appears to be of a slightly different shade,

i) there is excess mortar spillage at the side laundry door entrance,

j) the bottom course of the brick veneer overhangs the foundation by more than 25 mm. in several areas.

Generally speaking, the overall appearance of the masonry is less than desirable with many areas of poor workmanship. The brick, apart from varying in texture, were not found to be defective with no indication of failure, spalling or leaking. The reason for the texture variation is probably as already stated, i.e. the bricks are from different lot numbers and may even have been laid by different crews. In reference to the joints not being tooled, it should be pointed out that there is no requirement for tooling and quite often with this type of textured finish the joints are not worked at all.

In conclusion, it is the Warranty Program's opinion that the workmanship on this house is not acceptable and does not, for the most part, fall within the

realm of good workmanship as viewed by the industry and the Program.

The second Report reads in principal part as follows:

COMPLAINT - To replace exterior brick or compensate and to repair mortar. (Item #1 of Schedule A1 of the September 86 conciliation).

OBSERVATION - Despite the builder having returned to complete repairs to the masonry the following areas were found to be deficient: a) mortar joints in excess of 3/4" below the front bay window and the two sills on the northeast corner, b) uneven sills on the two northeast corner windows, c) mortar joints in excess of 3/4" on either side of the main entrance door, d) occasional vertical misalignment of the bricks on the east side wall, e) the west garage doorway, upper portion of the rear chimney and the southeast corner of the house are out-of-plumb, f) soft mortar in several head joints below east upstairs windows above garage, g) continued lack of blending of course (sic) textured bricks in two areas below the east upstairs windows. These repairs have to be completed to the Warranty Program's satisfaction.

Between the time when the home was inspected for the purposes of the first Report and reinspected for the purposes of the second Report a certain amount of remedial work was done. But the problem of the brickwork had not been cured.

The Warranty Program adopted the position at the time that the provisions or requirements of the warranty could not be satisfied if further and additional remedial work were required in the nature of replacing more bricks, i.e. remedial work falling short of what the Applicant demanded, namely, the total removal of all of the brick or veneer from the walls of the house and its complete replacement.

In support of the Applicant's claim that the only acceptable cure to the problem must consist of total removal and replacement of the offending brickwork we heard the

evidence of Mr. Murray Balshin of Majestic Home Inspection Service who is a man who has spent a long and active professional lifetime in the building industry, an experienced and accomplished builder and a very impressive witness indeed. Mr. Balshin testified that he had built 1800 houses during his career in the industry (as well as apartment buildings, multi-family residential buildings and commercial structures).

Mr. Balshin was taken through a series of photographs some forty-six photos, and testified at considerable length. He swore that the walls of this house were the worst and most badly laid or constructed he had ever seen in his career. He was not stating that this work was necessarily structurally unsound, although it was not structurally satisfactory either, but the point was that it was, literally a dismal unsightly mess. The brick varied in size, texture and colour. The surfaces were blotched with mortar. The courses were uneven. The joints with spaces between the bricks varied from very thin to grossly enlarged. Some of the bricks were chipped, some discoloured. The texture of certain of the bricks varied from smooth to rough. Some were overhanging, some recessed. And this was in contravention of the Ontario Building Code. The walls were not plumb but grossly out of plumb.

In short, Mr. Balshin, who impressed us as an experienced and knowledgeable builder of highest integrity, was clearly outraged at this bricklaying job and became rather demonstrably outraged as he developed his testimony. At one point he stated that the solution proposed by the Warranty Program, namely, to remove and replace more of the bricks, in addition to the ineffectual remedial work already done between October 1986 and March 1987, would "make the walls look like they had the measles." He repeated that these brickwork walls constituted the worst brickwork mess he had ever seen. The Tribunal was impressed and moved by this evidence, supported as it was by photographic evidence, and is of the opinion that Mr. Balshin's views should be adopted by it.

In the opinion of the Tribunal, aesthetic considerations may be less important than structural ones. Aesthetic outrages do not render homes uninhabitable. But we consider that the problems revealed by the evidence in this case show not just poor workmanship, but outrageously dreadful workmanship. We would be remiss in our duty to the consuming public of Ontario were we to decide that such a low standard of competence in the laying of bricks is acceptable or that the owners of new homes, as contemplated by the statute, should be forced to put up with such shoddiness or any kind of half-

quate partial rectification of the problem such as we consider the Warranty Program's recommended curative measures be. In our view, the walls of this house which have been the subject of this case constitute a textbook example of how to lay bricks. If some student enrolled in an elementary mason's course in bricklaying had submitted as an exercise a piece of work of this quality he or she would quite possibly be praised and perhaps transferred to some other less challenging course.

No consumer should be asked to endure such shoddy craftsmanship or in consequence thereof to suffer the resulting monetary reduction in the market value of his home. The applicant has experienced the inconvenience of having remedial work done on his home already. He and his family ought not to put through this a second time, and then perhaps, later on, a third time. Mr. Poirier's stated idea of an acceptable standard does not impress the Tribunal as appropriate.

Consequently, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow Mr. Vera's claim and to remedy the defective brickwork forthwith removing all of the existing brick and re-bricking the house with good quality brick of a comparable type.

WHITETOWN CONSTRUCTION INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
BARBARA NICHOLS, Member
D.H. MACFARLANE, Member

APPEARANCES:

MARIO CANTENARO, for the Applicant

CAROL A. STREET, representing the Registrar
under the Ontario New Home Warranties Plan Act

DATE OF

HEARING: 18 March 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Whitetown Construction Inc., appeals from the Proposal of the Ontario New Home Warranty Program dated January 19th, 1987, wherein the Program proposes to revoke the Applicant's registration. The primary reasons cited in support of the Proposal, as presented to this Tribunal, were that Whitetown had failed to comply with conciliation reports which listed numerous breaches of warranty with respect to four houses recently built in Etobicoke. In addition, it was alleged that the Applicant, now in the process of building three new homes in Newmarket, is encountering numerous difficulties in complying with building code standards there. Because of these difficulties, the Program had requested security to be posted - \$10,000 for each house in Etobicoke and \$5,000 for each house in Newmarket. The Applicant has failed to provide the necessary security.

Evidence on behalf of the Program was presented by Messrs. Johnson, Wheaton, Poirier and Reid, while Mr. Cantenaro, the sole director of the Company and Mr. Colacetti, the former president, gave testimony on behalf of the Applicant. In addition, the Tribunal had the benefit of the material filed as Exhibit 3, which contained much of the documentary evidence supporting the testimony of the four Program witnesses.

The facts, as the Tribunal understands them, can briefly be stated as follows.

The Applicant was incorporated in early 1985 and was registered in the New Home Warranty Program in January, 1986. It began construction of a number of houses and ran into numerous difficulties. The evidence before this Tribunal related specifically to 290, 294, 296 and 298 Rimilton Avenue in Etobicoke. These houses were sold and possession was taken in April and May 1986. Mr. Cantenaro said that at the time of closing, the houses were about 95% completed. Beginning in June, the Program began receiving complaints from the purchasers about the failure of the Applicant to properly rectify defects which had been noted. In due course, each house was inspected and conciliation reports were issued notifying the Applicant of the repairs which had to be done in order to comply with warranty provided in the Ontario New Home Warranty Program Act and the undertakings given by the Applicant. The Applicant did make some effort to effect repairs, but they were by no means completed by the time the Notice of Proposal was issued. The Program has now awarded contracts to rectify the items under warranty.

In addition, in August 1986, the Borough of Etobicoke Building Department had issued Orders to Comply with reference to each house. Evidently these Orders were ignored and in February 1987, Mr. Cantenaro (incorrectly described as Catenaro) and Whitetown Construction Inc., were each convicted on four counts of failing to comply with these Orders and each was fined \$5,000 on every count. The Tribunal was informed that an appeal from these convictions is expected to be heard this fall.

These facts were not denied by Mr. Cantenaro. He said that he has been sending work crews to the four houses in question and continued to make repairs after the Proposal issued. He said that he was unaware that contracts had been awarded and he stated that as far as he was concerned, all four purchasers of the Etobicoke houses were now satisfied that the work had been completed. He said he was prepared to post the security demanded by the Program. He also dismissed the problems in Newmarket, saying that the building code would be complied with. Mr. Colacetti who had left the Company in April 1986, said that the building inspector had passed the Etobicoke houses, and that he could not understand why the Orders to Comply had been issued in these circumstances.

Exhibit 5, which is a letter from the Applicant dated January 30th, 1987, to the Program speaks of a letter of credit in the amount of \$7,000 to be posted as security for seven houses to be constructed, including the three in Newmarket. To date, this letter of credit has not materialized. No letter from the Building Department of the Town of Newmarket substantiating that all infractions have been rectified was filed with this Tribunal, although again from the context of the January letter, it was supposedly being prepared at that time.

The evidence related to the numerous breaches of warranty is uncontradicted. Whether further repairs are still required at the four Etobicoke houses is unclear. The Program evidently did not make recent inspections nor did it get in touch with the owners either immediately prior to letting the contracts or before this hearing to ascertain the status. The Tribunal is mindful that the Applicant could also have called additional evidence to support its claim that there were no further problems, but surely it is in the interests of the Program to be satisfied that work needs to be done before issuing the contracts in respect thereto.

The Applicant has not been in the construction business very long. It has a poor track record. While it may have rectified the deficiencies in the Etobicoke homes - and the Tribunal has some doubts about this, numerous serious construction difficulties are being encountered in the Newmarket houses. The Applicant, either through lack of experience or bad luck, or both, is simply not meeting the standards required of it. Given this situation, the Program was not unreasonable in its demand that security be posted. The Applicant has failed to comply with this request even though it has been given ample opportunity to do so.

The Tribunal considered whether it would be appropriate to continue the Applicant's registration subject to terms and conditions. However, it has concluded that in the interest of the public, the registration should be revoked. The Tribunal points out to the Applicant and its director, Mr. Cantenaro, that under Section 10 of the Ontario New Home Warranties Plan Act, a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal.

RAYMOND F. ALLEN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
JOHN W. PATERSON, Member

APPEARANCES:

RAYMOND F. ALLEN, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 17 December 1986

Toronto

REASONS FOR DECISION AND ORDER

This hearing was convened at the request of the Applicant, Raymond F. Allen, pursuant to Section 9(2) of the Real Estate and Business Brokers Act (the "Act") in order to consider the Proposal of the Registrar of Real Estate and Business Brokers (the "Registrar") made pursuant to Section 9(1) of the Act to refuse to grant registration to the Applicant as a real estate salesman. The reason given by the Registrar for the refusal is that "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty". This is one of the grounds upon which registration can be refused under Section 6 of the Act.

The evidence that was put before the Tribunal by the Registrar includes four Certificates of Conviction certifying that the Applicant was convicted of the following offences:

1. Date of Conviction: June 14, 1982
Date of Offence : May 14, 1982

Offence: "unlawfully did steal one package of Erinmoretobacco and one Old Chum Tobacco (sic), the property of R.W. Bunting Drugs Ltd., carrying on business as Top Drug Mart, and of a value not exceeding \$200.00, contrary to section 294(b) of the Criminal Code."

Sentence: \$100.00 or 7 days in default

2. Date of Conviction: February 19, 1985
 Date of Offence : October 4, 1984

Offence: "unlawfully did steal a quantity of merchandise the property of Shoppers Drug Mart, R.J. Bond Drugs Limited and of a value not exceeding \$200.00 contrary to section 294(b) of the Criminal Code of Canada."

Sentence: \$200.00 or 15 days in default and probation for two years - remain out of Shoppers Drug Mart Stores in Peterborough.

3. Date of Conviction: Sept. 4, 1986
 Date of Offence : May 13, 1986

Offence: "unlawfully did steal merchandise the property of Len Welch's Food Market Ltd. and of a value not exceeding \$1,000.00 contrary to the provisions of Section 294(b) of the Criminal Code of Canada."

Sentence: \$200.00 or 15 days in default.
 Probation for 18 months - report once per month to probation officer - take such counselling & medical treatment as recommended by probation officer - to continue treatment with Dr. Tovich.

4. Date of Conviction: Sept. 4, 1986
 Date of Offence : May 13, 1986

Offence: "being a person bound by a probation order made by Judge R.B. Batten in the Provincial Court Criminal Division for the County of Peterborough on the 19th day of February, 1985, covering a period of two years, unlawfully did wilfully fail to comply with a condition of that order, namely: keep the peace and be of good behaviour, contrary to the provisions of section 666(1) of the Criminal Code of Canada."

Sentence: Probation for 18 months - report once per month to probation officer - take such counselling & medical treatment as recommended by probation officer - to continue treatment with Dr. Tovich.

Mr. Allen was previously registered as a salesman under the Act from approximately 1979 until November 1st, 1984, when his registration terminated as the result of illness. The application under review is dated May 12th, 1986 and was received by the Registrar on June 15th, 1986. As of that date the first two of the above-noted convictions had occurred. The Assistant-Registrar, Mr. Cook testified that he met with the Applicant shortly after June 15, 1986, in order to discuss his application for registration. At that interview, Mr. Allen disclosed to Mr. Cook that he suffers certain medical problems which cause him to experience serious memory losses and lapses. Mr. Allen told Mr. Cook that he does not recall carrying out the petty thefts of which he has been convicted.

Mr. Cook testified that, as a real estate salesperson, Mr. Allen would be dealing with the public and would in the normal course of business have access to vendors' homes in their absence. Mr. Cook expressed his concern that in view of Mr. Allen's past petty thefts, the security of those vendors' possessions could be at risk. Mr. Cook also testified that it is the policy of the Registrar not to register persons who are subject to a probationary order until after the probation period is over. In this case, Mr. Allen's probation will continue until November 1987.

The Tribunal had an opportunity to observe Mr. Allen on the witness stand and hear his evidence. It was clear that Mr. Allen does, in fact, suffer from serious memory lapses. Mr. Allen testified that he has been unable to secure alternative employment as the result of both his medical problems and criminal record. He submitted to the Tribunal that his registration as a real estate salesman was his last alternative to going on the welfare rolls.

A very unfortunate series of events, including serious medical problems, have led Mr. Allen to the sad position in which he now finds himself. The Tribunal has great sympathy for Mr. Allen's circumstances. However, the Tribunal's primary duty is to protect the public interest by insuring that only persons who can be counted on to carry on business in accordance with law are granted registration.

In the case before the Tribunal, it is to be noted that the third theft conviction occurred the day after Mr. Allen's application for registration was submitted. By his own evidence, the Applicant is unable to assure this Tribunal

that such conduct will not recur in the future. The Tribunal shares the Registrar's concern for the possessions of the persons whose homes the Applicant would have access to in his capacity as a real estate salesperson.

The past conduct of the Applicant, particularly the thefts carried out by the Applicant, does afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with law.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the registration of the Applicant.

FRANCESCO ARLOTTA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
SADIE MORANIS, Member

APPEARANCES:
MICHAEL DE RUBEIS, representing the Applicant
JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 13 July 1987 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has considered the terms of the agreement between the parties but do not think the terms extend sufficiently far. I am, however, going to ask Mrs. Verge to take the original as an Exhibit and give to counsel the copy of the document. I might say on behalf of the Tribunal that we appreciate the co-operation of both the Registrar and counsel in coming to some reasonable conclusion of this matter which has been obviously difficult for both sides.

The Tribunal wishes to make it clear that this case stands entirely on its own merits. It is based on the evidence before it which has been most impressive and that it is not in any way to be interpreted as a precedent for any future applications on similar facts.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to register the Applicant subject to the following terms and conditions:

1. This Order shall remain in force for a period of two years from the date of his registration;

2. Registration of Francesco Arlotta is to be only to Mr. Nardi's office, that is, the office of Ralph Nardi Limited where he will be under the direct supervision of Mr. Nardi and cannot during the term of this Order be employed by any other broker;
3. Mr. Nardi will give reports to the Registrar monthly for the first six months of registration and thereafter for a period of two years from the date of registration every two months;
4. There shall be reports every two months from Mr. Taylor and Mr. Panzica and Reverend Carparelli for the first six months and every three months thereafter during the term of this Order;
5. If the reports within the said period are in the opinion of the Registrar not satisfactory, then the Registrar shall revoke the registration of Francesco Arlotta forthwith without the right of appeal;
6. Mr. Nardi undertakes to this Tribunal to report any retrogression to previous behaviour to the Registrar. Any breach of this Order in any respect shall be sufficient cause for the Registrar to revoke the licence of Francesco Arlotta without the right of appeal.

MICHAEL J. BEAUREGARD

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROLAND C. BRENNING, Member

APPEARANCES:

MICHAEL J. BEAUREGARD, on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 21 October 1987

Ottawa

REASONS FOR DECISION AND ORDER

The Applicant, Michael J. Beauregard, born February 27th, 1954, has admitted falsifying his application for registration as a real estate salesperson filed June 16th, 1986. Specifically he failed to disclose his conviction on March 27th, 1972, upon a charge of Breaking and Entering, or, as well, the fact that a charge or charges of trafficking in narcotics (heroin) under the Narcotics Control Act of Canada were then pending against him. Question 7 in the form of application reads:

Have you ever been convicted under any law of any country or state or province thereof of an offence or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on a separate sheet.

His answer to that question was simply "No".

When asked why he did this he responded during the hearing by saying, with simple candour, that he wanted to be registered as a real estate salesperson and felt that the registration sought would not be granted if the Registrar knew of his criminal record and the charges pending.

The Tribunal is bound to conclude that the subsequent

conviction in respect to the charge of trafficking in heroin for profit and the earlier Break and Enter conviction disclose a propensity to disregard the law as well as dishonesty. The attempt to deceive the Registrar shows a lack of integrity. The Tribunal has no choice but to uphold the Registrar's Proposal.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal and revoke the registration of the Applicant.

We have more to say by way of obiter dicta. The Tribunal is of the opinion from the evidence led before us that the Applicant's employer Century 21 McGowan Real Estate Ltd., 33 John Street, Manotick, Ontario, and specifically the registered broker in charge of that business have been, to say the very least, careless in the performance of their duty under this Act upon which their registration as well depends. Specifically the employer joined in completing the Certificate of Employer forming part of this application and we frankly question whether this was done honestly. This question cannot be settled at this time but the Registrar may wish to go further into it at his discretion.

VICTOR A. BIRO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
M. JEAN WORMLEY, Member

APPEARANCES:

VICTOR A. BIRO, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 14 January 1987

Toronto

REASONS FOR DECISION AND ORDER

This hearing was held pursuant to the request of the Applicant, Victor A. Biro. The appeal arose as a result of the Proposal of the Registrar of Real Estate and Business Brokers (the "Registrar") made pursuant to Section 9(1) of the Real Estate and Business Brokers Act (the "Act") to refuse Mr. Biro's registration as a real estate salesman.

The Notice of Proposal, which is part of Exhibit 3, sets out 19 charges that the Applicant was charged with in or about 1986. We are advised that the Applicant was in fact convicted of the following charges:

(6) "that Victor Biro on or about the 27th day of January, 1986, at the Town of Newmarket, and elsewhere in the Province of Ontario, did have in his possession a prohibited weapon to wit: a cobra machine gun, contrary to the Criminal Code of Canada, Sec. 88(1)."

(19) "that Victor Biro on or about the 27th day of January, 1986, at the Township of Georgina, and elsewhere in the Province of Ontario, did have in his possession a restricted weapon for which he did not have a registration certificate issued to him, contrary to the Criminal Code of Canada, Sec. 89(1)."

We are further advised that the Applicant received sentences of two months intermittent on one charge and one month intermittent on the other charge, as well as a six month probationary period which is to expire on May 24th, 1987.

At the commencement of the hearing, counsel for the Registrar advised the Tribunal that the Registrar is prepared to recommend that the Applicant be registered as a real estate salesman commencing March 1st, 1987, subject to certain reporting conditions. We were advised by counsel for the Registrar that Detective Metcalfe, who was the investigating officer with respect to the charges laid against Mr. Biro, had advised him that Mr. Biro was in fact a minor player with a group of other young men with respect to the offences and that he did not take part in obtaining any of the illegal weapons and as a result the charges, with the exception of the two aforementioned charges, were withdrawn.

We are also advised that Mr. Biro had been very co-operative with the police and that at his sentencing hearing, the Judge indicated that he felt that it was unlikely that Mr. Biro would become a burden to society.

The Tribunal understands that it is normally the policy of the Registrar not to register an Applicant who has not completed a probationary sentence. However, in this case, the Registrar indicated he is prepared to make an exception because Mr. Biro has completed his qualifying real estate courses and if he would have to wait until the end of the probationary period, he would have to retake those courses.

The Registrar recommended certain reporting conditions which in effect would require the broker for which Mr. Biro worked to report every six months. The Tribunal is of the view that more frequent reporting should be required in this case. As a result, the Tribunal by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act directs the Registrar to allow the registration of the Applicant as a real estate salesman effective March 1st, 1987 on the following conditions:

1. That Bill Joyce Real Estate Ltd., the Applicant's intended employer, provide the Registrar with an agreement in writing whereby Bill Joyce Real Estate Ltd. agrees to report in writing to the Registrar every three months for a period of two years from March 1st, 1987, as to the Applicant's performance as a real estate salesman and in particular with respect to his compliance with the law.
2. In the event that the Applicant transfers to another broker, that that broker be notified of and provided with a copy of the Decision of the Tribunal, and that that broker provide the Registrar with an agreement in writing whereby that broker agrees to report in writing to the Registrar every three months for a period of two years from March 1st, 1987, as to the Applicant's performance as a real estate salesman and in particular with respect to his compliance with the law.

ORVAL DAVID BRADT

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
JAMES A. CATHCART, Member

APPEARANCES:

BRIAN P. NOLAN, representing the Applicant

STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 17 July, 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the Applicant, Orval David Bradt, as a real estate salesman. The reason given by the Registrar for his Proposal is that Mr. Bradt's past conduct affords reasonable grounds for belief that Mr. Bradt will not carry on business in accordance with law and with integrity and honesty.

Essentially the basic facts are not in dispute. In November 1985, Mr. Bradt applied for registration. In his application, he was less than completely forthright in responding to a number of questions contained in the application.

In response to question 4(b) which reads in part:

Have you ever had a licence or
registration of any kind refused,
suspended, revoked or cancelled? If yes,
give full particulars.

(emphasis added)

he answered, "Driver Licence."

In response to question 5(a) regarding bankruptcy, Mr. Bradt replied, "Discharge 1978 copy in your file."

In response to question 7 relating to any previous convictions, Mr. Bradt answered "Yes." The question goes on to say, "If yes, give full particulars...." It also states that, "Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing." Mr. Bradt attached the following information:

In January 9, 1984 I was convicted of conspiracy to traffic in cannabis marijuana. I was sentenced to three years and paroled in January, 1985.

While none of the answers to questions 4(b), 5(a) and 7 were false as far as they went, they by no means reflected the true state of affairs. For example, Exhibit 13 provides a history of Mr. Bradt's driving offences and suspensions. It shows that his driving licence was suspended twice, once in 1976 and again in January 1985.

Although Mr. Bradt did report the narcotics charge, Exhibit 13 shows that in 1976, Mr. Bradt was convicted of dangerous driving contrary to the Criminal Code. From the evidence, the Tribunal gathers that someone was killed in that incident. In 1981, Mr. Bradt was caught speeding. In 1982, he was convicted for failing to report an accident. He was convicted for speeding in 1983 and he was convicted for driving while impaired in 1984. These details were omitted from the 1985 application. They were also omitted in part from the applications for registration made in 1980 and 1983.

Furthermore, during the course of his testimony, Mr. Bradt also revealed that in 1984, he had been convicted of possession of cannabis. He was caught with the cannabis at the time he was apprehended for impaired driving. These two offences occurred during the period that Mr. Bradt was on parole as a result of the conviction for conspiracy to traffic. The parole period did not expire until January 1987.

The evidence shows that Mr. Bradt was registered as a real estate salesman off and on between September 1974 and February 1984. He was also registered under the Motor Vehicle Dealers Act for a time. There was no evidence that Mr. Bradt had ever contravened either the Real Estate and Business Brokers Act or the Motor Vehicle Dealers Act or that there were any complaints made against him.

Mr. Nolan, counsel for Mr. Bradt, argued that this Tribunal must balance the rights of the public against those of

the individual seeking registration and that only if the public interest was threatened, should the individual be denied registration and consequently the opportunity to earn a living in his chosen field.

Mr. Nolan submitted that Mr. Bradt had made a bad mistake by becoming involved in narcotics but he had paid for it. He pointed to the Registrar's Proposal which contained several allegations and inferences which had not been proven before this Tribunal and which in one instance were in error. (Mr. Bradt was not convicted of criminal negligence causing death, but of the lesser charge of dangerous driving.) He said that if Mr. Bradt's application for registration was denied, he would in effect be punished twice for the same offence. This would place him in double jeopardy in violation of the Charter of Rights. For these reasons, he submitted that the Registrar's Proposal should be overruled and that Mr. Bradt should be granted registration.

Mr. Bradt, now 37 years old, married with two children is currently on a workers' compensation allowance. By trade, he is a mechanic, but because of his disability, he is unable to pursue this line of work. He now looks to be employed in an industry in which he has had some experience. One of his former employers has indicated that he is prepared to employ Mr. Bradt should he be registered.

The standard of "reasonable grounds to believe" is not to be equated with proof beyond a reasonable doubt. The standard to be met is one of reasonable probability. In assessing the probable future action of an individual, some reliance may properly be placed on the past acts of that individual.

The Tribunal has carefully reviewed the evidence. While the answers contained in the 1985 application were not false, they were not the whole truth either. Whether the answers were deliberately phrased to mislead or were worded with little regard to need to disclose full particulars is not clear. In either case, Mr. Bradt was not completely and fully honest in his answers. In this, he showed a lack of integrity.

The Tribunal places little weight on Mr. Bradt's bankruptcy in 1976. There was no evidence of any breaches of the Bankruptcy Act - indeed the Trustee in his Report states that the "conduct of the Bankrupt is not subject to censure." However, the offences for which he was convicted were serious. The Tribunal is particularly concerned by the fact that even

While he was on parole, Mr. Bradt broke the law. He evidently had not learned his lesson.

The cumulative effect of Mr. Bradt's brushes with the law, the nature of the offences and the fact that his parole only ended in January 1987 leads this Tribunal to the conclusion that the Registrar has not erred in his belief and that Mr. Bradt should not be registered at this time. It is the opinion of this Tribunal that the public would not be well served if the Registrar's Proposal was overturned.

In reaching this decision, the Tribunal has not overlooked the Charter of Rights argument. Although Mr. Nolan did not elaborate, the Tribunal assumes he was referring to the provisions of Section 11 of the Charter. The effect of this section was discussed in relation to a regulatory statute in e: Petroleum Products Act 33 D.L.R. (4th) p.680. The headnote reads in part as follows:

Section 10 of the Petroleum Products Act empowers the Public Utilities Commission to suspend, revoke or cancel a licence. It is pure administrative law which does not call upon criminal law or the threat of imprisonment to aid its enforcement. Proceedings subjecting a licensee to the controls of a regulated industry are not by nature criminal. The Commission does not have any power to impose criminal-like sanctions. The mere fact that a legislative sanction can in some sense be characterized as a punishment is not sufficient to classify the proceedings imposing the sanction as a proceeding in relation to an offence within the meaning of Section 11.

Although the powers of the Commission under the Petroleum Products Act, R.S.P.E.I. 1974 are not identical to those of this Tribunal, we are satisfied that the Charter of Rights argument submitted by Mr. Nolan is not relevant to these proceedings.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

VITO LUIGI CALOGERO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman
BARBARA NICHOLS, Member
A. DONALD MACHESTER, Member

COUNSEL: STUART B. SCOTT, representing the Applicant
A.N. MAJAINA, representing the Registrar of
Real Estate and Business Brokers

DATES OF 23, 24, 25, 26, 27, 31 March 1987

HEARING: 1, 2 April 1987

Toronto

REASONS FOR DECISION AND ORDER

The Proposal to revoke the registration as real estate salesman of Vito Calogero arose as a result of an investigation, or more accurately an inspection, carried out on behalf of the Registrar, Real Estate and Business Brokers Act. It is ironic that the initial investigation was not of the conduct of Mr. Calogero, but that of Inter-City Realty Inc. and the real estate broker Vittorio Grossi. The investigation of the latter was prompted by a letter of complaint sent to the Registrar on behalf of Mr. Calogero by his solicitor.

As the investigation progressed, the focus shifted to Mr. Calogero's past conduct. After the initial report, a Notice of Proposal dated May 21st, 1985 was issued. The matter did not stop there and the main Proposal was augmented by further and other particulars of wrongdoing contained in two letters and a further formal notice. The appeal before the Tribunal relates to issues raised in all four documents.

The reasons cited in the Notice of Proposal for revoking the registration are that Mr. Calogero lacks financial responsibility; that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; that he carried on activities in contravention of the Act or Regulations; and that he provided false information in his

applications for renewal. The letters of February 10th, 1986, and February 27th, 1986, provided further particulars of his failure to disclose full information in the applications. The Notice of Further and Other Particulars dated March, 1987, cited the alleged misconduct of Mr. Calogero in relation to a cheque improperly withheld, for a period of time, from his former broker, Humber Valley Realty Ltd.

The hearing lasted eight days and numerous documents were filed. The evidence will be summarized very briefly in these Reasons, however, all of the testimony and the exhibits were carefully considered in reaching a decision.

Mr. Calogero, now 53 years old, married with four grown-up children, came to Canada at age 16 and immediately went to work as a labourer. He was first registered as a real estate salesman in March, 1974. At the time of the hearing, he was in the employ of Safeguard Real Estate Ltd. During the intervening years, he has been with about ten different real estate firms, staying with some for only a few weeks, with others for longer periods. When Mr. Calogero first applied for registration, he reported that he had made an assignment in bankruptcy in 1973 and had been granted an unconditional discharge in February, 1974.

Mr. Calogero applied for renewal of registration in each of the years, 1976, 1977, 1978, 1979, 1980 and 1981. In each application, he marked the 'No' box in response to these questions:

- Have you been convicted of any criminal offence or violation of any statute during the past 12 months?
- Has any licence or registration of any kind (including driver's licence) been refused or cancelled during the past 12 months?
- Are there any unpaid judgments recorded against you?
- Have there been any proceedings in bankruptcy affecting you during the past 12 months?

In a number of cases, the 'No' answer was patently false because the record before the Tribunal shows that Writs

of Execution had been filed with the Sheriff as early as November 1979. The record also shows that Mr. Calogero's driver's licence had been suspended in 1978 and that there were a number of driving infractions during that period.

At the time that Mr. Calogero applied for renewal of registration in May, 1983, he was an undischarged bankrupt, having been petitioned into bankruptcy by one of his judgment creditors effective September 22nd, 1981. Nevertheless, he continued to answer 'No' to the questions relating to bankruptcy and outstanding debts. The testimony indicates that Mr. Calogero and his broker Mr. Grossi met with the Registrar around the application date in 1983 and that following the meeting, a Statement of Affairs of Non-Business Bankruptcy was provided and appended to Mr. Calogero's application for renewal. While nothing turns on it, his broker, Mr. Grossi, although he said he knew that Mr. Calogero was bankrupt, certified on the application that to the best of his knowledge and belief the information, including the 'No' answers, was correct.

In April, 1985, Mr. Calogero again applied for renewal and again answered 'No' to the questions, when in fact the true answer should have been 'Yes'. His then broker, Michael Ceci, who also knew the true facts certified that the answers were correct.

On the issue of financial responsibility, the evidence shows that during the past few years, Mr. Calogero has earned substantial commissions from the sale of real estate and that he received his absolute discharge from bankruptcy upon payment of \$20,000 on February 24th, 1987. There were references in the reports of the Trustee in Bankruptcy to non-disclosure of assets and liabilities and fraud on the part of Mr. Calogero. The Trustee also referred to an investigation of Mr. Calogero's actions by the R.C.M.P. The Trustee was not called to give evidence. As far as this Tribunal is aware, no charges were laid against Mr. Calogero either under the Bankruptcy Act or any other Act as a result of his bankruptcy.

At the time of this hearing, there were two known outstanding judgments. The debt to the Scarafiles, who petitioned Mr. Calogero into bankruptcy, was not affected by the discharge since the judgment of the Court stated that the Scarafiles were entitled to \$32,280 plus interest for "damages for fraud". (There was some indication that leave to appeal the judgment might be sought.) The other debt, for \$4,000, payable to Mr. Logiudice may, by now, have been paid in full

since there was a direction to this effect, dependent on the completion of the sale of Mr. Logiudice's property.

The issue of Mr. Calogero's past conduct arises out of a number of incidents, the majority of which involve disputes over commission with various real estate brokers. The conduct of Mr. Calogero as revealed in the documents in the Scarafile action and the circumstances surrounding the Logiudice debt were also cited by the Registrar.

Mr. Logiudice described the events in 1983 leading up to the loan of \$4,000 to Mr. Calogero and his difficulty in obtaining repayment. Mr. Calogero, borrowing the money for one year only and agreeing to give a mortgage for security if needed, executed a promissory note to that effect. When payment was due, Mr. Calogero could not or would not repay in full. He did make a \$500 payment on account. Mr. Logiudice obtained a default judgment for the amount due plus interest in October 1984. In order to facilitate repayment, Mr. Logiudice, in February of this year, agreed to list his home with Mr. Calogero, expecting to be paid out of any commission which Mr. Calogero might earn as a result. This reasonable resolution fell apart when Mr. Calogero refused to pay \$6,000 as he believed only \$4,000 was due. However, this matter now seems to be settled and as earlier noted, the repayment of this debt now seems to be assured.

With reference to the Scarafile matter, the Tribunal can only look to the documents filed in the Supreme Court, and the reasons given by Mr. Justice Grange when he delivered his judgment in the case. The action arose as a result of a purchase by the Scarafiles of an equitable interest in one-half of Mr. Calogero's 50 per cent interest in 340398 Ontario Ltd.

In his judgment, Mr. Justice Grange states, in part, as follows:

As I have stated the claim is based on fraud, negligent misrepresentation and breach of fiduciary duty...I find it unnecessary to proceed beyond the first ground...While I have found the defendant guilty of fraudulent misrepresentation I do not consider his conduct so outrageous and scandalous...as to justify punitive damages. The defendant had no conception of his duty to the plaintiffs. I believe that notwithstanding the fraudulent misrepresentation the defendant somehow thought he was entitled to do what he did.

Mr. Calogero said he was not properly defended by his counsel in that action before Mr. Justice Grange and two letters were filed indicating that the Scarafiles were apprised of some of the facts by the solicitor who was acting for all parties at the time.

In addition to suing Mr. Calogero, the Scarafiles apparently reported his actions to the Registrar and to the Ethics Committee of the Toronto Real Estate Board. It seems that the Registrar met with Mr. Calogero at that time, but took no further action. The Ethics Committee dismissed the case without reasons.

The remaining incidents cited by the Registrar essentially arose out of disputes over commission. For purposes of this decision, it is not necessary to review every transaction in detail. Suffice to say that the evidence about the transactions involving Mr. Grossi and Mr. Broz revealed very questionable conduct on the part of a number of individuals in addition to Mr. Calogero. There were allegations and counter allegations of wrongdoing. Some of the evidence was self-serving as the parties have been and may be involved in further legal actions. Mr. Calogero denied doing anything wrong. He said that he only did what others, including solicitors, told him to do.

Mr. Grossi said that he was grabbed by the throat by Mr. Calogero, but he admitted that he did not think Mr. Calogero intended to harm him. Mr. Broz said that he had received one telephone threat to the effect that if he did not pay Mr. Calogero's commission, he, Broz, would have trouble, but Mr. Broz could not definitely identify the caller. Mr. Calogero denied grabbing Mr. Grossi or making any telephone calls.

The situation with Mr. Ceci was somewhat different although the dispute was also over commission owing. When he left the employ of Humber Valley Realty Limited, Mr. Calogero asked for a final accounting of commission owing to him. For some reason, he did not get it. Mr. Calogero then took it upon himself to obtain a commission cheque and to withhold it from Mr. Ceci pending a final accounting. The cheque was eventually given to Mr. Ceci upon the advice of Mr. Calogero's solicitor.

The additional activities carried on by Mr. Calogero which were alleged by the Registrar to be prohibited by the Act related to the former's involvement with two Corporations. Mr. Calogero was a shareholder and director in 340398 Ontario

limited. It was the sale of Mr. Calogero's interest in this company, as distinct from the property held by it, which was the subject matter of the Scarafile action. This Company was dissolved in November 1981. The second Company was Vical Management Corporation. Mr. Calogero testified that this company never owned assets and never operated. This evidence appears to be contradicted by the reference in Mr. Justice Grange's decision to the fact that the property held by 340398 Ontario Limited was transferred to Vical Management Corporation. Vical was dissolved in May 1982.

Mr. Calogero testified on his own behalf offering explanations for many of his actions. In most cases, he either denied any wrongdoing or said he was only doing what others told him to do. His wife testified that Mr. Calogero was a good husband and father. His current employer finds his conduct "exemplary" saying he is a salesman highly thought of by his colleagues and clients. Mr. Crane, a former solicitor of Mr. Calogero, described Mr. Calogero as in some ways unsophisticated, emotional and hardworking. He also said Mr. Calogero was like a bulldog when he got a listing because he didn't give up on it. Mr. Crane had recommended Mr. Calogero to his own father-in-law and had complimented Mr. Calogero on his efforts in selling the property listed by his father-in-law.

Under the Real Estate and Business Brokers Act, a person is entitled to registration unless that person becomes disentitled by virtue of the applicable provisions contained in Section 6 or 7 of the Act. (In this case, Section 7 does not apply, nor does clause (c) of subsection (1) of Section 6). The onus is on the Registrar to satisfy the Tribunal that the provisions of Section 6 prevail. The standard of proof to be met is not as high as in a criminal prosecution. The criterion followed by the Tribunal in the past is set out in Re: Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2d), p.470. The decision of Mr. Justice O'Leary reads in part as follows:

In all cases, before reaching a conclusion of fact, the Tribunal must be reasonably satisfied that the fact occurred, and whether the Tribunal is so satisfied will depend on the totality of the circumstances, including the nature and consequences of the fact or facts to be proved, the seriousness of the allegation made, and the gravity of the consequences that will flow from a particular finding.

The Tribunal is also mindful of the Decision in 1983 of the Divisional Court in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen wherein that Court held that "...unless the Tribunal can find that it [past conduct] does not [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Mr. Scott, counsel for the Applicant, raised several additional issues related to the evidence before this Tribunal. Firstly, he was critical of the Registrar for not appearing before the Tribunal to give direct evidence in support of his Proposal. While it may have been helpful for the Tribunal to have heard from the Registrar, the fact that he did not appear is of little consequence. The Tribunal has made its decision on the basis of the evidence filed and testimony heard. It has given what it believes appropriate weight to any hearsay evidence presented. Secondly, Mr. Scott questioned whether the provisions of Sections 11, 12 and 13 of the Act had been complied with in the initial investigation and with reference to the certification of documents as provided in Section 13(2) of the Act during the hearing. It was his position that these sections had not been complied with, and therefore the documents presented by Mr. Tandler, the Inspector in this case, should not be admissible or acceptable as evidence in the case.

There was no evidence before the Tribunal that Mr. Tandler had obtained any documents unlawfully or without the consent of those who had possession of them. Although the documents were not certified in accordance with the provisions of Section 13(2), the Tribunal is of the opinion that this omission does not preclude their admissibility in the hearing. In the Tribunal's opinion, the documents tendered by Mr. Tandler were relevant, and again appropriate weight was given to them.

On the issue of the false answers contained in the applications for renewal, Mr. Scott argued that since the Registrar had been fully apprised of the true financial circumstances of Mr. Calogero both in 1983 and again in 1985 and had reviewed Mr. Calogero's application each time before renewing the registration, he should not now raise the issue of misinformation as part of the Proposal. The Tribunal does not agree with Mr. Scott. Mr. Calogero did not deny that the answers were his. He did say that he did not know that his driving licence was suspended, and in this regard, the Tribunal is prepared to give him the benefit of the doubt. However, with reference to the other answers concerning the outstanding

judgments, the bankruptcy and the driving infractions, Mr. Calogero knowingly filed false information. The Tribunal takes a dim view of this action. The fact that the brokers on separate occasions certified that the answers were correct is not material in the Tribunal's deliberations regarding the conduct of Mr. Calogero. However, the Tribunal observes that generally there seems to have been a very cavalier attitude in completing the applications. Mr. Calogero should be disabused of this attitude. This type of conduct will not be condoned by the Tribunal and will not be overlooked in the overall assessment of Mr. Calogero's past conduct.

The next issue is the general past conduct of Mr. Calogero. Although, as noted at the beginning of these reasons, the hearing in this case continued for eight days, the evidence is not clear or conclusive in many respects. There were numerous individuals named who, if they had been called, could have shed some light on some of the very grey areas of the evidence. However as it now stands, there were numerous contradictions in the evidence, particularly as it related in the business transactions involving Mr. Calogero and the real estate brokers Grossi and Broz. The Tribunal is left with the impression that several of the parties to these transactions were motivated in large part by greed and that their conduct was not in accordance with the spirit and intent of the Real Estate and Business Brokers Act. Many, including Mr. Calogero, took every opportunity to take advantage of any situation which might lead to sharing in commission. Honesty and integrity as between themselves seem to be words that were foreign to them and they were not above manipulating the situation for their own advantage.

There are also a number of unanswered questions of how Mr. Calogero obtained the commission cheque which he withheld from Humber Valley Realty Limited and Mr. Ceci. Mr. DeBaisse, who perhaps could have enlightened the Tribunal, was not available. It is clear, however, that Mr. Calogero, when no longer in Humber Valley's employ, obtained a cheque and refused to deliver it immediately to the rightful recipient as he is required to do.

In the Tribunal's opinion, Mr. Calogero did not act with honesty and integrity in his dealings with Mr. Logiudice, firstly, in not being completely candid with him when he offered to provide security on his home and then in his failure to pay on time. The Tribunal can only wonder if Mr. Logiudice would ever have received payment if he had not listed his home with Mr. Calogero and if Mr. Calogero had not been before this

Tribunal. The Tribunal also finds that on the face of it, Mr. Calogero did not act with honesty and integrity in the Scarafile matter but takes Mr. Justice Grange's summation that "notwithstanding the fraudulent misrepresentation, the defendant (Colagero) somehow thought he was entitled to do what he did" at face value.

On the matter of financial responsibility, the Tribunal notes that Mr. Calogero has recently obtained his absolute discharge from bankruptcy. He has earned significant commissions during the past few years which should be sufficient to discharge any liabilities as they become due. The Tribunal expects that the Logiudice debt will be paid shortly, if it has not already been paid. The Scarafile debt remains outstanding. The Scarafiles may take whatever steps they feel necessary to recover on the judgment. The Tribunal does not believe that it should interfere in that process by using the Real Estate and Business Brokers Act to force payment. The Tribunal is not a collection agency for creditor

The Tribunal has before it evidence that Mr. Calogero was a shareholder and director in 340398 Ontario Limited and i Vical Management Inc. Aside from the documents filed in the Scarafile suit, little or no direct evidence was led to show that Mr. Calogero's involvement with the companies was contrary to the Act. Nevertheless, the Tribunal is reasonably satisfied that this is so.

In summary, although the Tribunal believes that Mr. Calogero is now in a position where it can be expected that he will be financially responsible in the conduct of his business and that he is no longer carrying on activities that would be in contravention of the Act and regulations, the cumulative effect of his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal, having had the benefit of hearing Mr. Calogero's explanations and observing him throughout the hearing, shares Mr. Justice Grange's opinion that Mr. Calogero thinks he is entitled to do all that he did. This is a dangerous belief on Mr. Calogero's part because it shows that he does not appreciate that in a regulated industry, a high standard of conduct must be maintained. In spite of these conclusions, the Tribunal will not direct the Registrar to carry out his Proposal.

We feel that Mr. Calogero ought not to be deprived of his means of earning a livelihood in this industry, provided that the public interest is not in jeopardy.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke the registration but instead to suspend the registration of the Applicant for a period of four months; and as a condition of Mr. Calogero's registration, Mr. Calogero take and successfully complete, to the satisfaction of the Registrar, the course or courses of study referred to in Section 14 of Ontario Regulation 891 under the Act before his registration is reinstated.

The Tribunal is further of the opinion that future registration should be subject to the following terms and conditions:

1. That Mr. Calogero's broker, whoever that may be, from time to time, shall be informed of the suspension
2. That the broker shall undertake to report in writing, to the Registrar on the conduct of Mr. Calogero every six months for such period as the Registrar deems appropriate.
3. That any application for transfer to another broker by Mr. Calogero shall be subject to the approval of the Registrar which approval will not be unreasonably withheld.
4. That Mr. Calogero shall inform the Registrar of any interest the former may have in any corporation that deals in the trade or ownership of real estate.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant Vito Luigi Calogero. The appeal had not been concluded at the time of this publication.

STEVE DENT

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
BARBARA NICHOLS, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

HENRY M. LANG, Q.C., representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers.

DATE OF

HEARING: 11, 12 August 1987

Sault Ste. Marie

REASONS FOR DECISION AND ORDER

In 1980, a Mr. and Mrs. Desbiens purchased a property in Blind River but subsequently removed to Sudbury in the course of their employment. They rented the property in Blind River and discussed with Mr. Dent, the Applicant, its sale since he intimated he had someone in mind who might buy it. They had intended to continue to rent it but the sale of the property as proposed by Mr. Dent appeared to be a more attractive alternative.

As a result, they signed a Listing Agreement with Mr. Dent on November 26th, 1982 for \$34,900.00 and received an Offer to Purchase from one Buswa which was presented by Dent on December 9th, 1982. In the meantime, the tenants had vacated the premises and the purchasers arranged to take possession on January 2nd, 1983, the date reserved for closing the transaction.

The terms of the Offer to Purchase go to the heart of the matter. It stated that a deposit of \$3,500.00 had been received by the realtor represented by a cheque and a further \$3,000.00 would be paid by the purchaser on closing. The balance was to be secured by the assumption of the vendors' mortgage with the bank. After the Offer had been accepted by Desbiens, it apparently was directed to CMHC together with an application for the CMHC grant of \$3,000.00 accorded to first time home buyers. The funds to close the transaction were,

therefore, to come from the grant. Unhappily, the realtor had not received a cheque for the \$3,500.00 as reflected in the Offer but had obtained a Promissory Note from the purchasers for that amount repayable in 36 monthly instalments and bearing interest at the rate of 20%. It is not disputed by the vendors that they had seen the Promissory Note at the time the Offer was presented to them by Dent but it is difficult to determine whether or not they were aware of the full implications of making a Promissory Note as opposed to a cheque which would, of course, represent cash in their agent's trust account. They were, however, advised and assured by Mr. Dent that there would be full payment of the Note in a very short time because Buswa expected a payment of \$5,000.00 from the Department of Veteran Affairs as compensation for some disability incurred in the services.

In the meantime, it appears that neither of the solicitors involved in this transaction were aware of the Promissory Note and, therefore, took the terms of the Offer to purchase at their face value. CMHC, relying on the same evidence, approved the grant and the purchasers received their \$3,000.00 enabling them to close the transaction on January 13, 1983.

All might have been well if Buswa had received his expected compensation from the Department of Veteran Affairs shortly thereafter and paid off the Note but since he did not (regardless of whether or not he received it), the following chain of events were set in motion:

Buswa defaulted completely in his obligation on the Note and no payments were ever made. Buswa also fell immediately in default in his payments to the bank under the first mortgage resulting in Power of Sale proceedings. The bank then sold the property for some \$16,000.00 and, fortunately since the mortgage was insured, was reimbursed by CMHC. No proceedings were, therefore, taken by either the bank or CMHC against Desbiens which incidentally was the policy of CMHC. From the \$3,000.00 due on closing, the vendors received \$360.00 after paying real estate and lawyers fees of \$2,640.00. Mr. Dent received no commission since the broker with whom he was associated at that time had received the commission and immediately made assignment in bankruptcy.

None of the parties in this sad transaction, therefore, prospered as its result. Desbiens was never paid, Buswa lost his house, although he had no material interest in it, Dent lost his commission, Dent's broker went into

bankruptcy and CMHC, in compensating the bank, lost some \$28,000.00 together with its \$3,000.00 grant. We do not know the amount recovered by CMHC in its eventual sale of the property. Desbiens then sued Dent in District Court for the recovery of the commission and obtained a Judgment. To date, this Judgment has not been retired. It all began with a Promissory Note prepared by Mr. Dent.

The issue before the Tribunal is whether or not it should sustain the Proposal of the Registrar to revoke the registration of the registrant (who now is a broker). Mr. Burton, in his initial presentation, offered in evidence before the Tribunal the Judgment and Reasons for Judgment of the District Court. This became the subject of contention between him and Mr. Lang, counsel for Mr. Dent.

The Chairman held that although the Judgment was admissible, being a public document, the Reasons for Judgment were not. The Reasons, reflecting the conclusion of the trial Judge were based on evidence which was before him but would not necessarily be before the Tribunal and, therefore, should not be admissible in these proceedings.

Mr. Dent, in his defence, pointed out that he had discussed with a solicitor the implications of a Promissory Note as opposed to a cheque. He said he was advised they were virtually the same documents in their effect. The Tribunal, however, is of the view that Mr. Dent in his experience of eight years as a real estate salesman knew full well the difference and finds as a fact that the Offer to Purchase was designed to mislead CMHC and to deceive the solicitors concerned with the transaction.

The results have been disastrous for all parties involved and could have been avoided if Mr. Dent had not employed a course of deception to gain a commission which, unfortunately for him, he never received.

Much evidence was adduced by Mr. Lang of Mr. Dent's character and standing in the community. It is incontroverted and believable. In his own evidence, Mr. Dent indicates his remorse for what he calls a mistake and undertakes to this Tribunal that it will never again occur.

Nevertheless, the evidence is overwhelming against Mr. Dent being able immediately to retire his obligations resulting from this transaction and the Tribunal finds as a fact that the Registrar is entitled to invoke Section 6(1)(a) of the the Act in his Proposal to revoke the registration of the registrant.

The Tribunal, having given due deliberation to this matter, and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, directs the Registrar to carry out his Proposal to revoke the broker's registration of the registrant without prejudice to the registrant's right to apply and be granted forthwith a licence of salesman which when granted by the Registrar must be only on the following conditions:

1. That he be employed by a Real Estate Broker approved by the Registrar who will report to the Registrar monthly concerning Mr. Dent's sales for such period as the Registrar requires;
2. In the event the registrant makes a further assignment in bankruptcy within a period of three years from the date hereof, the Registrar shall forthwith revoke the licence granted under this Act;
3. The registrant may not submit an application for a broker's licence for a period of three years from the date of this Order or such longer time as in the discretion of the Registrar is advisable.

ALBERT FACCENDA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
DR. STUART E. ROSENBERG, Member
GEORGE CORMACK, Member

APPEARANCES:

JEFFREY R. MANISHEN, representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 17 September 1987

Toronto

REASONS FOR DECISION AND ORDER

In March 1986, Albert Faccenda applied for and was granted registration as a real estate salesman. Subsequently, it came to the attention of the Registrar, Real Estate and Business Brokers that Mr. Faccenda had lied on his application in that he deliberately failed to disclose that there were criminal proceedings pending against him at the time of application. The Registrar also learned that Mr. Faccenda had later been convicted of the criminal offence of conspiring to traffic in cocaine and had been sentenced, on a plea of guilty, to twelve months imprisonment and a further eighteen months probation. As a result of this information, the Registrar proposed to revoke Mr. Faccenda's registration on two grounds: that Mr. Faccenda's past conduct afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty; and that Mr Faccenda had been in breach of a term or condition of registration. The appeal from that Proposal is now before this Tribunal.

The basic facts are not in dispute. While Mr. Faccenda was employed as a first class constable with a regional police force (but on suspension with pay awaiting the outcome of the pending charges referred to above), he began to take the real estate courses necessary for registration. Upon successfully completing the courses, he resigned from the police force and applied for registration.

Once registered, he entered the employ of Com-Can Mercantile Realty Corp. and Chris DiLiberto as brokers.

In October, 1986, he entered a plea of guilty to the conspiracy charge and was sentenced as noted above. Mr. Faccenda was placed on a temporary absence pass after serving several months and later placed on parole to continue until November 27, 1987. Thereafter, he will be on probation. He has remained in the employ of Com-Can throughout this period. Both his associate Peter Glaw and his broker, Mr. DiLiberto were aware of Mr. Faccenda's difficulties with the law as was the Metropolitan Hamilton Real Estate Board. No steps were taken to discharge him or to actually suspend his membership in the Board. Mr. Faccenda appears to have been very successful in selling real estate during this time, and the Registrar has received no complaints about his conduct.

In his testimony Mr. Faccenda admitted these facts, however, he said that in falsely completing the application for registration, he had not meant to deceive. He said that he had asked the Human Rights Commission and his own lawyer about the need to answer a question relating to outstanding proceedings and had been told that he did not have to answer it. Mr. Faccenda also outlined the events leading up to the charges against him. Without going into details, Mr. Faccenda, together with a fellow officer (Ripani), loaned \$6,000 to a 'friend' for a period of six months. The interest on this loan was to be \$2,000. When the loan went into default, he and Ripani agreed to take some cocaine in lieu of repayment. However, the debtor informed the police of the arrangement and both were charged before they got possession of the narcotic. It is to be noted that this version of the events is not completely on all fours with that contained in the transcript of proceedings in Provincial Court at which time Mr. Faccenda pleaded guilty to the charge.

Evidence as to his character and qualities as a real estate salesman was given by Mr. Glaw and Mr. DiLiberto. Letters of reference were also filed as part of Exhibit 5 from clients and professional colleagues. No evidence was called on behalf of the Registrar.

Counsel for Mr. Faccenda argued that although the statement in the application was factually dishonest, given the advice Mr. Faccenda had received, there was no intention to deceive. He pointed out that the conviction was an isolated incident and not one involving fraud or theft. He submitted that there was nothing in Mr. Faccenda's past

conduct to indicate that Mr. Faccenda would not act properly and in accordance with law in the business of selling real estate. He urged this Tribunal to continue the registration subject to whatever terms were considered reasonable.

The Tribunal does not know precisely what question was put to the Human Rights Commission or to Mr. Faccenda's lawyer. The fact of the matter is that Mr. Faccenda was obviously concerned about the effect that the pending criminal proceedings would have on his application. He was so much concerned that he asked for advice. The advice given was that he did not have to answer the question. Mr. Faccenda chose not to heed that advice but chose instead to answer it, but to answer falsely. The Tribunal rejects his assertion that he did not intend to deceive. On this ground alone, Mr. Faccenda placed his registration in jeopardy.

The conviction against him is of a serious nature. The facts, as related by Mr. Faccenda, leading up to the conviction show that he lacks integrity and honesty where money is at stake. As a police officer, he knew that what was being contemplated was illegal, nevertheless, in order to recoup his money, he was prepared to take the chance. He was apprehended before he could fully carry out his scheme. Mr. Faccenda is still on parole and will be on probation for a further eighteen months.

The Tribunal has carefully weighed all the facts and has concluded that there are no mitigating factors which would warrant a continuation of his registration as a real estate salesman on any terms.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant Albert Faccenda. The appeal had not been concluded at the time of this publication.

ISRAEL JAKOBS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
HARRY HAYES, Member

APPEARANCES:

WILLIAM HALKIW, representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 18 June 1987

Toronto

REASONS FOR DECISION AND ORDER

Israel Jakobs, the Applicant herein, is appealing the Proposal of the Registrar of Real Estate and Business Brokers, to refuse the Applicant registration as a real estate salesman. The reasons cited by the Registrar in his Notice of Proposal dated February 20th, 1987, are that in his opinion, Mr. Jakobs is not entitled to registration because he cannot reasonably be expected to be financially responsible in the conduct of his business and his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The facts were not in dispute. In November, 1986, Mr. Jakobs, having completed the mandatory real estate courses and having received a passing grade applied for registration as a real estate salesman. He fully disclosed his criminal record in the application. Briefly, Mr. Jakobs was first convicted in 1982 of being in possession of a stolen credit card. In addition to a fine, he was placed on probation for one year. In September, 1986, he was again convicted, this time on a charge of theft of property exceeding a value of \$200. This was not an ordinary theft. Mr. Jakobs, while in the employ of a jeweller, substituted zircons for diamonds which had been brought to his employer

for cleaning and polishing. For this offence, Mr. Jakobs received a term of imprisonment of 90 days to be served on weekends, was placed on probation for two years, commencing December, 1986, and was ordered to make restitution to his employer in the amount of \$2,950. As of the date of the hearing, Mr. Jakobs had paid approximately \$1,500 in restitution.

It was argued by Mr. Jakobs' counsel that these bare facts did not reflect the mitigating circumstances which were apparently taken into account by the judge in imposing sentence in 1986 and should be taken into account by the Registrar and this Tribunal in reaching its decision.

According to his testimony, Mr. Jakobs, now 29 years old, unmarried and a Canadian citizen, arrived in Canada in 1975, fully expecting his parents and two sisters to follow him here. At that time, he was a trained dental technician, but since he could not speak English, he could not find employment in that field. He began to learn English and became an apprentice in the jewellery trade. During the first six months of his apprenticeship, he received no salary. Subsequently, when he had any extra money, he sent it to his parents. He lived very frugally. He was given a stolen credit card by an acquaintance in 1982. He had suspicions about the card but never reached the point of using it. (He was caught with the card within two weeks of receiving it.)

In the same year, 1982, his father became ill and Mr. Jakobs returned to his parental home in 1983 to help his family directly. He remained in Israel for almost two years, but to avoid military service and to be in a position where he could earn more money with which to help his parents, he returned to Canada in 1984. He obtained a position as a polisher and cleaner of jewellery and continued working in that trade until he was apprehended and charged in October 1985 with the second offence above-noted.

As his father's health deteriorated, Mr. Jakobs felt obliged to send more and more money to his parents to help them through a very difficult financial situation. Although his father died in August 1985, his mother remained unemployed until October 1986.

Throughout the period of his father's illness, Mr. Jakobs said he was very depressed and very concerned about his family's finances. He said he committed the thefts of

the diamonds to obtain immediate cash which he said he sent to his mother.

This evidence was not challenged and the Tribunal accepts it.

In the Notice of Proposal, the Registrar stated that Mr. Jakobs was indebted in the amount of \$3,000 which was the amount of restitution Mr. Jakobs was obliged to pay. Mr. Jakobs testified that after he was dismissed by his employer following the discovery of the thefts, he obtained a job, first as a taxi driver, and later as a distributor of diet products. At the present time, he is again employed by a jeweller as a polisher and cleaner, earning some \$1,500 to \$1,600 per month. He said that if he stays on, there is room for promotion in the firm.

Because he knew that he would face legal costs and possibly a fine, Mr. Jakobs took steps to save money for these contingencies. He moved in with a friend to share living expenses and adopted an even more frugal style of living. He continued to send money to his widowed mother. When he was sentenced, he was able to pay his lawyer's fees, as well as \$1,000 as partial restitution. He has continued to pay \$125 per month on this account so that it has been reduced from \$2,950 to \$1,400. He has a small outstanding balance on his credit card account.

Mr. Jakobs said he has \$5,000 U.S. in a bank account which is actually his mother's money, but which he may use if required, and a further \$1,000 of his own money. Aside from a 1977 model car, he has virtually no assets.

The Tribunal accepts that this is an accurate picture of Mr. Jakobs' financial position at this time. It can only observe that given the level of earnings and expenditures and the money sent to his mother over the past few years, it is remarkable that Mr. Jakobs has been able to meet his obligations and to save some money as well.

Evidence of good character was provided by two friends of Mr. Jakobs. He also filed a letter from a real estate broker which stated that the firm wished to employ Mr. Jakobs upon his registration as a real estate salesman. The letter was dated November 27th, 1986, which was before sentence was imposed on Mr. Jakobs. It is not clear whether this offer of employment still stands. However, this is not material to the Tribunal's decision.

Mr. Jakobs also filed a letter from his current employer stating that he (Jakobs) is in good standing with the firm and had displayed a good character. At the time of the hearing, Mr. Jakobs had been employed with the firm for only three and one-half weeks, although he evidently knew the owner previously.

Mr. Jakobs was very ably represented by his counsel and this Tribunal is not unsympathetic to this young man whose actions seem to be motivated by a sense of strong filial obligation to his family and who has survived some very difficult times in a foreign country with no family to give him moral guidance and support. However, the Tribunal must weigh the interests of the public against the interests of and sympathy it may have for the Applicant. On balance, the public interest must prevail in this case.

The Tribunal has taken into account that Mr. Jakobs was forthright in disclosing his criminal record in his application and his evident resolve to turn his life around and to make something of it.

A criminal record, of itself, is not necessarily a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the Tribunal's opinion, on the evidence before it, not enough time has elapsed between Mr. Jakobs' last conviction and his application for registration to show that indeed, Mr. Jakobs has turned over a new leaf and that his past conduct will not be repeated in the future. In these circumstances, registration subject to terms and conditions is not appropriate.

In addition, the Tribunal shares the Registrar's concerns about Mr. Jakobs' financial situation. It appears that some of the financial burden will be lifted from Mr. Jakobs in the future, but for the present it is still there. While he has shown that he can live on a very small budget, when circumstances were such that he needed money, he broke the law to get it. The Tribunal believes a stronger financial base would be desirable for Mr. Jakobs before he enters an industry that has no certainty as to earnings.

The Tribunal directs Mr. Jakobs' attention to Section 10 of the Real Estate and Business Brokers Act which reads as follows:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

For the present, however, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

DAN E. KORNITZER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

DAN E. KORNITZER, on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers.

DATE OF
HEARING: 15 September 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant was first registered as a salesperson under the Real Estate and Business Brokers Act (the "Act") on February 13th, 1975. He was first registered as a broker under the Act on November 10th, 1977. From December 29th, 1979, until March 3rd, 1987, he was registered as the Broker/President of Dan Kornitzer Real Estate Ltd. (the "Company").

As the result of a complaint made to him by a member of the public, the Registrar carried out an investigation of the Applicant's dealings as a broker. During the course of the investigation, the inspector involved discovered four separate instances where trust funds that had been received by the Applicant in connection with real estate transactions were not deposited into a trust account, as required by the Act, but were instead deposited into the general account of the Company and used to pay business expenses.

Subsequently, charges were laid against Mr. Kornitzer and the Company on four counts of breach of trust contrary to Sections 20(1) and 50(1)(c) of the Act. On December 3rd, 1986, Mr. Kornitzer entered a plea of guilty to each count and was fined \$500.00 per count. The charges against the Company were withdrawn by the Crown.

The Ministry's investigation also disclosed that the Company had issued a large number of "NSF" cheques in the

two-year period preceding the investigation.

In February 1987, the Registrar became aware that Dan Kornitzer Real Estate Ltd. had been dissolved by order of the Companies Branch of the Ministry of Consumer and Commercial Relations effective October 11th, 1982, for failure to file a return pursuant to the Corporations Tax Act. As a consequence of the discovery of the dissolution of the Company, the Registrar terminated the registration of the Company effective March 3rd, 1987 and Mr. Kornitzer's personal registration as a broker was also effectively terminated as at the same date.

Subsequently Mr. Kornitzer re-applied for registration as a broker under the Act and the Registrar issued a Notice of Proposal to refuse such registration. Mr. Kornitzer requested this hearing before the Tribunal pursuant to Section 9(2) of the Act.

The Registrar's Proposal cites two grounds for the refusal:

- (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and
- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Mr. Kornitzer testified that he was unaware until February, 1987, that the Company had been dissolved by the Companies Branch. He does, however, freely admit to all of the other facts put into evidence by the Registrar. His appeal to the Tribunal is based on his submission that his past breaches of trust should not be a bar to his registration as a broker because they were committed in circumstances which, he submits, were so unendurable and oppressive, that he was, in effect left with no alternative but to commit the breaches referred to.

The difficulties described by Mr. Kornitzer were, in essence, financial difficulties which threatened the continuation of his business and livelihood. Unable to meet his financial obligations as they fell due, and with no other access to funds, Mr. Kornitzer chose to use trust funds to

placate his creditors rather than to allow his business and, in his view, his career, his life, to collapse completely.

It is clear from Mr. Kornitzer's evidence that although he was aware that he was contravening the Act by using trust funds for his own business purposes, Mr. Kornitzer regarded these trust funds as "his own money" which he had "just earned" and which "would be his in a short time."

Mr. Kornitzer testified that, in one instance, a real estate transaction failed to close and he, therefore, did not become entitled to a commission. The trust funds received by him in respect of the transaction had already been deposited into the general account of the Company and expended. Mr. Kornitzer testified that, in that instance, he did "what was necessary" in order to raise the money and repay it to the person entitled thereto.

Of grave concern to the Tribunal is Mr. Kornitzer's insistence, and apparently genuine belief, that what he did was only what any other real estate broker would have done in the same circumstances. He forthrightly admitted to the Tribunal that he could not swear that he would not do it all again if he found himself in the same circumstances. He insists that if only the Registrar had not intervened, he would have pulled himself out of his difficulties. In effect, he does not take full responsibility for the fact that he is now facing the loss of his registration as a broker, but to some extent blames the Registrar for interfering with his attempts to save his business.

At present Mr. Kornitzer has been living on borrowed funds and, according to his own evidence, owes a total of approximately \$55,000 to various persons. Although he has no registration, he has kept his office operating and has been knocking on doors and lining up deals and, in effect, carrying on with business, short of taking listings or actually selling properties. He claims that he has \$100,000 in commissions "lined up" at this time.

Throughout his difficulties, Mr. Kornitzer did not seek legal advice or assistance. He explained that he was too embarrassed to relate his difficulties to any of the lawyers he dealt with. He tried to hide his difficulties from everyone; he was too proud to ask for help, too proud to consider bankruptcy or even to consider working for another broker.

This is a very sad case. The Tribunal does not lightly endorse what is, in effect, a revocation of the registration of someone who has been registered under the Act for some twelve years. Unfortunately, Mr. Kornitzer has been the victim of his own self-deception and misguided pride. This continues in that, while he admits the facts alleged against him, he refuses to fully acknowledge that he acted improperly. Instead he continues to insist that he had no other choice but to do what he did.

As has been stated many times by this Tribunal, its primary duty is to protect members of the public from persons who would take advantage of their position of trust.

The Tribunal finds that the evidence more than amply supports the Proposal of the Registrar with respect to both grounds.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant Dan E. Kornitzer. The appeal had not been concluded at the time of this publication.

JACK ROSS LANE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
JOSEPH STRUNG, Member

APPEARANCES:

JACK ROSS LANE, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 13 February 1987

Toronto

REASONS FOR DECISION AND ORDER

By application dated August 20th, 1985, Jack Ross Lane, the Applicant in these proceedings, applied to the Registrar, Real Estate and Business Brokers for registration as a real estate salesman. After over a year had elapsed, the Registrar issued his Proposal to refuse registration. Mr. Lane now appeals the Registrar's Proposal.

The Registrar's decision was essentially based on the facts that Mr. Lane, at the time of application for registration, was an undischarged bankrupt and was still on parole, having been convicted in September, 1984, on numerous charges of theft and fraud under the Criminal Code. In these circumstances, the Registrar was of the opinion that Mr. Lane was not entitled to registration because Mr. Lane could not reasonably be expected to be financially responsible in the conduct of his business and that there were grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Mr. Lane was first registered as a salesperson in 1967 and he remained registered continuously until August 1983 when his registration was terminated. He was evidently successful and began buying and selling real estate for his own behalf. He then became involved as a land developer in partnerships with others, being responsible for the

management of these projects. Mr. Lane admitted that as the projects got larger and more complicated, he felt he was in over his head. He said that in business matters, he relied on the advice of his accountants and lawyers. Although essentially convicted of misappropriation of funds entrusted to him, Mr. Lane said that he did not know he was breaking the law when he used land development funds improperly.

In 1984, Mr. Lane was charged and convicted of 20 charges of theft and fraud and sentenced to two years imprisonment. Previously in January, 1982, Mr. Lane had declared personal bankruptcy. At the time, his liabilities were well over \$4 million.

It should be noted that there were no charges against Mr. Lane arising out of his employment as a real estate salesperson and there were no allegations that he had acted improperly or unlawfully in that capacity.

Mr. Lane argued that aside from the "one lapse" which resulted in a series of convictions, he had been and now was a law abiding citizen who had paid his debt to society and wished to get back into the industry in which he was most experienced to earn his livelihood. He submitted that to deny him registration would be to deny him the opportunity for rehabilitation in his home community. He also said that he was very much aware that if he breaks the law again, the penalty could be quite severe.

At the time of the hearing before this Tribunal, Mr. Lane, now 55 years old, has completed his parole and has received a bankruptcy discharge. He has purchased a house jointly with his son, owns a car, and is working part-time as a manager in a bowling alley. It appears that he is beginning to put his life back together again. No witnesses were called on his behalf, however, Mr. Lane filed letters of recommendation from the Deputy Chief of Police for Strathroy, where Mr. Lane now resides, the Chief of Police for Avlmer, his Bank Manager and his solicitor. In addition, he filed a letter from a real estate broker who was prepared to hire him if registration was granted.

The Tribunal is not totally without sympathy for Mr. Lane's position. However as was pointed out in the Brenner decision, a decision of the Divisional Court of Ontario, unless the Tribunal can find that the Registrar acted in error, in that the past conduct in issue does not afford

reasonable grounds for the Registrar's opinion, the Tribunal should not order the Registrar to refrain from carrying out his Proposal.

Although Mr. Lane is no longer on parole (it ended October 31st, 1986) and has now been discharged as a bankrupt effective September, 1986, his past conduct is still very much in issue in determining whether registration should be granted.

The criminal offences for which Mr. Lane was convicted took place over a four year period and show a continuous course of conduct. (The offences were only brought to light when one of Mr. Lane's partners reported the matter to the authorities). The trial judge noted that Mr. Lane did not personally profit from his illegal activities and that his stealing and fraud lacked a "sophistication". The judge, however, also noted that others lost money because of Mr. Lane's actions. It is not clear how much money was involved. The amount involved in the bankruptcy was \$4.5 million. These monies have not been repaid by Mr. Lane, although he believes that many of the creditors recovered their money when all the assets of the estate were liquidated. There was no direct evidence on this matter.

The Tribunal is mindful that Mr. Lane has applied for registration as a real estate salesperson and not as a real estate broker, and would, in this capacity have little or no access to trust funds. The Tribunal must also take into account the public interest at large in making its decision.

Mr. Lane's parole was only completed on October 3rd, 1986. Since then Mr. Lane appears to be conducting himself in a lawful and financially responsible matter, but this has been over a very short period of time. Given his overall, earlier past conduct, the Tribunal is not satisfied that in future Mr. Lane will continue to be financially responsible and that he will conduct himself in business in accordance with law and with integrity and honesty, certainly not to the degree necessary to find the Registrar acted in error. With the passage of time, this evidence may be available, but for the present the Tribunal agrees with the Registrar's opinion.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

FRANK LEUNG

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
BARBARA NICHOLS, Member
JOHN W. PATERSON, Member

APPEARANCES:

HUGH ROWAN, Q.C., representing the Applicant

STEPHEN A. AUSTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF HEARING: 14, 15 May, 1986; 5, 6, June, 1986; and
13, 14, 16 April 1987 Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal dated November 21st, 1985, the Registrar, Real Estate and Business Brokers, proposed to revoke the registration of Frank Leung, the Applicant herein, as a real estate salesman. The reason cited for the Proposal was that, in the opinion of the Registrar, the past conduct of the Applicant afforded reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. It is this Proposal which is now being appealed to this Tribunal.

The Registrar's particulars of the past conduct, while detailed, were a mixture of fact, allegation, assumption and/or conclusion. Essentially, the past conduct complained of related to two transactions, namely, the listing for sale of property at 244 Dupont Street and at 507 Kingston Road, both in Toronto.

Frank Leung now 32 years old, married with two young children, was registered under the Real Estate and Business Brokers Act as a salesman in August, 1981. For the period August 4, 1981 to July 5th, 1985, he was employed by Steve Wong Real Estate Ltd. On July 6th, 1985, he entered the employ of Living Realty Inc. During his tenure at Steve Wong

Real Estate Ltd., he performed well as a salesman and left on good terms with Steve Wong, the principal of that company. Mr. Steve Wong, in the Notice of Employment Change dated July 8th, 1985 stated that "Mr. Frank Leung's conduct while in employ was considered to be satisfactory." Mr. Leung continues to be employed by Living Realty Inc. Stephen Wong (as distinct from Steve Wong) is a principal with Living Realty Inc. He testified that Frank Leung is a good real estate salesman, very honest and good for the firm. There was no evidence of any complaints against Mr. Leung save and except for the one which lead to the investigation of Mr. Leung's actions during the period immediately prior to his transfer from Steve Wong Real Estate Ltd. to Living Realty Inc.

Some weeks after Mr. Leung left Steve Wong Real Estate Ltd., Steve Wong learned that while Mr. Leung was still employed by his firm, the latter apparently assisted the owners of the two properties previously mentioned to list their properties with Living Realty Inc. Steve Wong reported this to the Registrar who caused the investigation to be made.

There is no question that 244 Dupont Street was listed with Living Realty Inc. on June 19th, 1985 and that Frank Leung introduced the owner A.F. Wong to Peter Woo who was the Manager of the downtown office of Living Realty Inc. In fact, Mr. Leung even completed the Listing Agreement after translating and discussing it with A.F. Wong. On the face of it, this conduct on the part of Frank Leung was contrary to section 30 of the Act which reads as follows:

No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer.

The bald facts as above set out were not denied by Mr. Leung. However, in his testimony before this Tribunal, Mr. Leung provided the background and explained his actions in involving Living Realty Inc. and Peter Woo in the sale of 244 Dupont Street.

Mr. Leung first met A.F. Wong, who neither speaks nor understands English on June 15th, 1985, through a chance meeting with a college friend at the office of Steve Wong Real Estate Ltd. The friend, Edmond Koh, who also testified, introduced Mr. Leung to A.F. Wong at that meeting. Mr. Koh advised Mr. A.F. Wong to consult with his friend, Mr. Leung, on real estate matters if he needed any advice on that subject. According to the evidence of all three, the sale of 244 Dupont Street was not discussed at that time.

Mr. Leung stated that within a day or so, A.F. Wong telephoned him to ask what the Dupont property was worth as he, A.F. Wong was thinking of selling it. Mr. Leung said that he told Mr. A.F. Wong that he could not provide that information at that time, but that he would ask his broker, Steve Wong, to help. Later, again according to Mr. Leung, he called back and said Steve Wong had refused to provide assistance. Mr. Leung then asked Mr. A.F. Wong if he knew of any other real estate firm. It was Mr. Leung's testimony that A.F. Wong said that he had heard of of Living Realty Inc., but knew no one there.

As it happens, the offices of Steve Wong Real Estate Ltd. and Living Realty Inc. are situated in the same corner building with entrances on Spadina Avenue and Dundas Street respectively. Mr. Leung said that he knew Peter Woo of Living Realty Inc. and he arranged a meeting between Mr. Woo and Mr. A.F. Wong at the latter's place of business. The meeting took place on June 19th. Mr. Leung said that after he had introduced Mr. Woo to Mr. A.F. Wong, he went next door to a coffee shop. Some 10 to 15 minutes later, he was joined there by Messrs. Woo and A.F. Wong. A blank Listing Agreement was produced. Mr. Leung translated the contents of it and filled in the previously agreed upon listing price and the commission and the name of the listing broker. A.F. Wong signed the Agreement and his signature was witnessed by Peter Woo. Mr. Leung maintained that as a favour to his friend Edmond Koh, he was acting as a consultant to A.F. Wong and not in his capacity as a real estate salesman. He said that at that time, he did not expect to receive any commission on the sale of 244 Dupont Street.

A.F. Wong's testimony, given prior to that of Mr. Leung, corroborated the events of the first meeting and the meeting at his business premises and coffee shop with Mr. Woo and Mr. Leung. He also said that he had telephoned Mr. Leung prior to the June 19th meeting but had been told by Mr. Leung that the latter was busy with personal matters. Mr. A.F. Wong

made no mention of the fact that he, Wong, had suggested Living Realty Inc., although he did say that on June 19th he was aware that he had listed his property with that firm and Mr. Woo.

Mr. Woo confirmed Mr. Leung's evidence insofar as it related to his introduction to Mr. A.F. Wong and the listing of the property. Mr. Woo said he was surprised that Mr. Leung had approached him, but that he went along with the arrangement because he had been assured by Mr. Leung that Steve Wong had refused to help. It is to be noted that Steve Wong could not recollect any conversation with Mr. Leung concerning the Dupont property at that time.

To complete the story, in July, 1985, Mr. Leung, then with Living Realty Inc. again became involved with the Dupont property. He obtained the signature of A.F. Wong on the Price Change Agreement and was thereafter shown as the listing agent. The property itself was finally sold in November of that year by another broker.

The evidence relating to the listing of 507 Kingston Road with Living Realty Inc. is contradictory. Exhibit 9, which is the first Listing Agreement, shows the signatures of the joint owners of the property and the purported date of execution of July 2nd, 1985. The witness to the signature of Walter Kaminski is Stephen Wong of Living Realty Inc., the witness to the signature of Janina Kaminski is Frank Leung. On the face of it, Mr. Leung is again in contravention of Section 30 of the Real Estate and Business Brokers Act.

Mrs. Kaminski was called as a witness on behalf of the Registrar to testify about the circumstances surrounding the execution of this Agreement. Her recollection of the specific events related to Exhibit 9 was not clear. Her evidence as to the date of execution was as follows:

Question by Mr. Austin: "From this document that you have in your hand (Exhibit 9), can you now recall upon what date this listing agreement was signed?"

Answer by Mrs. Kaminski: "Well, I don't recall but it says the date on it, so I guess I have to agree." The date on the agreement was July 2nd, 1985.

Mrs. Kaminski, later again in response to a question of Mr. Austin said "...if my husband sign something, if its on two names then I don't read it--you know, whatever it says, I just sign." [sic]

Mrs. Kaminski stated that it was her recollection that the Listing Agreement was signed at night in the presence of Mr. Leung, whom she referred to as "Frank", her husband and one other person whom she could not identify other than that he was an Oriental. (At one time during her testimony, she indicated by pointing to Steve Wong that he was the third party. In this she was clearly mistaken.) She said that the Agreement was already signed by her husband, but she did not know where or when he had affixed his signature to it.

The testimony of Mr. Leung and Mr. Stephen Wong is not on all fours with that of Mrs. Kaminski.

Stephen Wong was the Sales Manager in the Woodbine Office of Living Realty Inc. He said that he received a telephone call from Walter Kaminski regarding the Kingston Road property. He stated that Mr. Kaminski had not asked for him specifically, but since he did not have a salesman on duty at that time, he took the telephone call and acted on it. Mr. Kaminski evidently wanted an appraisal of his property and a meeting was arranged on July 2nd, 1985, between the two at Mr. Kaminski's business premises on Kennedy Road. On the way to that meeting, Stephen Wong took a look at the Kingston Road property. When he arrived at the Kennedy Road premises, Stephen Wong said he was surprised to find another real estate agent already there. This agent was Frank Leung. Mr. Stephen Wong said he had never met Mr. Leung before. Also at the meeting was the Kaminski's son Peter. Stephen Wong testified that he discussed the sale of the Kingston Road property with the two Kaminskis in the absence of Mr. Leung. Mr. Leung was also given the opportunity to make his presentation in the absence of Stephen Wong. In the end, Walter Kaminski asked Mr. Leung to leave and Stephen Wong to stay to discuss the terms of the Listing Agreement. It was at this time that Stephen Wong learned that Mrs. Kaminski was a joint owner of the Kingston Road property and in order to protect his commission, he said she would have to sign the Agreement as well. According to Stephen Wong, Mr. Kaminski said it wasn't necessary to have his wife's signature because she would do as he said. Stephen Wong, not wishing to risk losing the listing and being in a hurry, obtained Mr. Kaminski's signature on a blank Listing Agreement and left.

Stephen Wong stated that during his brief chat with Mr. Leung at the Kaminski Kennedy Road premises, he had been impressed with Mr. Leung's conduct and either the same evening or the following day, he telephoned Mr. Leung and offered him a position with Living Realty Inc. Mr. Leung said he would have to think it over, but within a few days, he called Stephen Wong and said that if the offer was still open, he would like to join the firm. This he did on July 6th, 1985.

Between July 2nd and July 6th, Stephen Wong had done nothing further on the Kingston Road property. When Mr. Leung joined the firm, Stephen Wong instructed Mr. Leung to obtain Mrs. Kaminski's signature, since Mr. Leung already knew Mr. Kaminski.

Mr. Leung's testimony was substantially the same as Stephen Wong's as it related to the Kennedy Road meeting and the offer of employment. He said that Peter Kaminski, who had been his client before, had telephoned him about the sale of his father's property on Kingston Road. Mr. Leung agreed to meet with the father and son on July 2nd, 1985 at the Kennedy Road premises. He said that he also met Stephen Wong there for the first time and that they had exchanged business cards. Mr. Leung did not know Walter Kaminski and was introduced to him by Peter. Mr. Leung had not inspected the Kingston Road property prior to the meeting and he said he received a key from Walter Kaminski and went to look at it. While there he met one of the tenants. On his return to the Kennedy Road premises, he found Stephen Wong still there. After hearing from both Stephen Wong and Mr. Leung, Mr. Kaminski told Mr. Leung that he preferred to list with the larger real estate firm Living Realty Inc. After congratulating Stephen Wong, Mr. Leung left.

The same evening July 2nd, 1985, he received a telephone call from Stephen Wong inviting him to join Living Realty Inc. Mr. Leung said he then decided to check around other real estate brokers before making up his mind. To this end he met with Tony Chan, President of Triple Crown Realty, on July 3rd and Ernest Yew of Sincere Realty on July 4th. (These meetings were confirmed in letters from both brokers filed with the Tribunal. As well, Mr. Yew testified before the Tribunal and produced his office diary with the pertinent dates indicating that the meeting had been arranged and had taken place.) After these meetings, Mr. Leung decided to join Living Realty Inc. He resigned from Steve Wong Real Estate Ltd. effective July 5th and became an employee of Living Realty Inc. on July 6th.

Upon joining the firm, he received the Kingston Road file from Stephen Wong who asked him to get Mrs. Kaminski's signature on the Listing Agreement. Mr. Leung said he met with Walter and Janina Kaminski at their home on the Sunday evening of July 7th. At that time, he obtained Mrs. Kaminski's signature and witnessed it. He had previously completed the Listing Agreement by filling in the sale price, commission rate and so on. He said that, at the time, he did not notice the date inserted by Mrs. Kaminski when she signed. (It was July 2nd.) The property was sold by Mr. Leung on July 25th.

Neither Walter Kaminski nor Peter Kaminski was called as a witness by either side.

This is, of necessity, an abbreviated version of the testimony related to the listing of the two properties. Other witnesses were called by both the Registrar and the Applicant. While their testimony is not summarized, it has been taken into account by the Tribunal in reaching its decision, as have the numerous exhibits.

In his reply argument, Mr. Rowan, counsel for the Applicant, directed the Tribunal's attention to the decision of the Divisional Court in Bernstein and College of Physicians and Surgeons of Ontario 1977, 15 O.R. (2d), p.447. This decision has been previously considered by the Tribunal in other hearings and the criteria with respect to the issue of standard of proof has been followed by it. The headnote of the Bernstein decision reads in part as follows:

While the standard of proof is the civil standard, which is variously described as proof by a preponderance of evidence or on the balance of probabilities, the standard has never been precisely formulated. Nevertheless, before a tribunal can find a fact proved it must be reasonably satisfied that it occurred and a mere mechanical comparison of probabilities independent of the belief in the reality of the factual occurrence of the alleged event is not sufficient. Moreover, the proof must be clear and convincing and based on cogent evidence. Of particular relevance to this determination is the gravity of the consequences of any finding by the tribunal.

Since the consequences of a finding of professional misconduct in the circumstances are extremely serious, the Committee should have acted with great care and caution in assessing all the evidence and should not have proceeded upon fragile or suspect testimony.

With reference to the evidence related to the listing of 244 Dupont Street, the Tribunal places considerable weight on Exhibit 5 since, in the final analysis there was no real dispute of the basic facts but only of the motive of Mr. Leung in acting as he did. Exhibit 5 shows that Mr. Leung was involved in listing the property with a broker who was not his employer contrary to the Act. Mr. A.F. Wong's testimony, given through an interpreter contained some inconsistencies as to time, place and sequence of events. It did support Mr. Leung's testimony that he could not act for A.F. Wong at the material time because of personal reasons. Mr. Steve Wong denies or at least can't remember if he was asked by Mr. Leung to help out. Mr. Woo's testimony fills out the picture to a limited extent since he said he relied on Mr. Leung's assurances and made no personal inquiries as to the exact status of the situation. Giving Mr. Leung the full benefit of any doubt, the Tribunal agrees with Mr. Leung's counsel that in acting as he did, and for whatever reason, he acted stupidly. This does not excuse his action and does not lessen the gravity of it. The prohibition in Section 30 of the Act is absolute. Does this one act of stupidity, in an otherwise unblemished career, warrant or provide reasonable grounds for revocation of registration under Section 6(1)(b) of the Act? The Tribunal thinks it does not.

In relation to the listing of 507 Kingston Road, the most damaging exhibit to Mr. Leung, on the face of it, is Exhibit 9. The witness called by the Registrar to speak to this exhibit was Janina Kaminski.

The Tribunal gathers from the evidence that Mrs. Kaminski is a housewife who, for whatever reasons, takes little interest in her husband's business affairs. As noted in an earlier ruling in this hearing, English is a second language for her and while she was capable of understanding and answering questions of a simple nature, she seemed to have difficulty in understanding and responding to questions involving more technical terms. For example, the Tribunal is not at all convinced that Mrs. Kaminski understood the significance and the difference between a Listing Agreement and an Offer to Purchase.

Mrs. Kaminski appeared before the Tribunal on three separate occasions: twice in 1986, and finally in April of this year. The Tribunal finds her evidence unclear and at times contradictory. The Tribunal does not believe that Mrs. Kaminski intended to deliberately mislead the Tribunal or that she was attempting to obscure some evidence out of a sense of loyalty to Mr. Leung, who has apparently served the Kaminski family well. The Tribunal has formed the opinion that she simply did not clearly recall the circumstances surrounding the signing of the Listing Agreement, because as was her usual practice, she merely did what she was told by her husband without paying attention to what she was signing or who was there at the time. As she very candidly said in her testimony "whatever my husband does I just follow..." The Tribunal concludes that after approximately a year had passed, she was not certain what documents she had signed, nor, more importantly, when exactly she had signed them.

Mrs. Kaminski was not positive that she signed the Listing Agreement on July 2nd. She assumed that she did because that was the date shown on the Agreement that was placed in front of her. If Mrs. Kaminski is mistaken, and she did not sign the Listing Agreement until some time after July 6th, 1985, then Mr. Leung has done nothing contrary to the Act with respect to the Kingston Road property.

Her testimony as to the date when she affixed her signature is contradicted by both Stephen Wong and Mr. Leung. To find that her evidence on this point is to be preferred over that of the other two men, the Tribunal would have to find that there was collusion on the part of Mr. Leung and Stephen Wong to mislead this Tribunal. Not only that, but that either both Mr. Yew and Mr. Chan were involved in this, since their evidence supports the evidence of Stephen Wong and Mr. Leung that the latter, as late as July 4th, had not decided to join the Living Realty Inc. firm, or that they were used in 1985 to provide a back-up for a story which might be needed sometime in the future. While there are some areas of the evidence which show remarkable coincidences, the Tribunal, based on the whole of the evidence, is not prepared to find that there was a deliberate orchestration of a scenario whereby Mr. Leung could be absolved of any wrongdoing under the Real Estate and Business Brokers Act.

On the evidence submitted on behalf of the Registrar, the Tribunal is not reasonably satisfied that Mr. Leung was involved in a trade in real estate on behalf of Living Realty Inc. prior to July 6th, 1985, with respect to 507 Kingston Road.

In reaching this conclusion, the Tribunal is mindful of Exhibit 25 and 25A, but it places little reliance on it since there was no evidence of when the information was received by the Toronto Real Estate Board.

Earlier in these Reasons for Decision, the Tribunal found that Mr. Leung had stupidly and perhaps unintentionally contravened the Act with reference to 244 Dupont Street but had concluded that one act did not justify revocation of registration. No other contravention has been proven. Nevertheless while revocation of registration may be too severe, the Tribunal is of the opinion that a suspension of one month is in order in the circumstances.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke the Applicant's registration but to suspend it for a period of one month.

DOV DONALD MANN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C. Chairman, Presiding
RICHARD F. STEPHENSON, Member
SADIE MORANIS, Member

APPEARANCES:

ROBERT M.S. LAMBERT, Q.C., representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 3 September 1987

Toronto

MAJORITY DECISION

The following is the decision of the Chairman and
Richard F. Stephenson, Member.

The Applicant, Dov Donald Mann, is appealing the
Proposal of the Registrar of Real Estate and Business Brokers,
dated April 28th, 1987, wherein the latter proposed to refuse
the registration of Mr. Mann as a real estate salesman. The
reason cited for the proposed refusal is the alleged past
conduct of the Applicant.

In an application for registration, Mr. Mann disclosed
that there were several criminal charges outstanding against
him. (He also disclosed a previous bankruptcy which is not in
issue in this hearing.) At the hearing, counsel for the
Registrar advised the Tribunal that the Registrar was relying
solely on the criminal charges that have been laid against Mr.
Mann as the basis for his belief that Mr. Mann will not carry
on business in accordance with law and with integrity and
honesty.

Mr. Burton also informed the Tribunal that the
Registrar had been unsuccessful in his attempts to obtain more
information than that contained in the two Informations filed
as Exhibits 6 and 7 in these proceedings. It appears that the
information related to conspiracy to traffic in cocaine
(Exhibit 7) has been withdrawn by the police, but new

informations have been laid containing substantially the same charges.

The charges against Mr. Mann are twofold - firstly, that he has conspired with others to traffic in cocaine, and secondly, that he conspired with others to break and enter into a premises. These charges, we are told, are not expected to be heard for several months. In the meantime, Mr. Mann is on bail and is obliged to report on a regular basis. There is no other evidence of past conduct.

Aside from Mr. Mann, no witnesses were called, although two letters of character reference were filed, as was a letter indicating that Mr. Mann had been employed by the post office during the recent postal strike.

The issue for the Tribunal to decide is a narrow one, and as far as we are aware, this is the first time that this particular question is before it. In a nutshell, the issue for the Tribunal to determine is whether the charges of conspiracy against Mr. Mann are alone sufficient grounds to support the Registrar's belief that Mr. Mann will not carry on business in accordance with law and with integrity and honesty.

Mr. Burton for the Registrar stated that the Registrar was not determining the guilt or innocence of Mr. Mann and he submitted that the charges did provide the reasonable grounds for the Registrar's belief. He maintained that no irreparable harm would be suffered by Mr. Mann if he was not immediately registered as a real estate salesman, that Mr. Mann could gain employment elsewhere and that there was nothing to prevent Mr. Mann from re-applying for registration in the future once the criminal charges were finally disposed of by the Court. Mr. Burton argued that the public interest should take precedence in this case and that the highest order of honesty and integrity was required of everyone in the real estate business.

On the other hand, it was argued by counsel for Mr. Mann that until there is a conviction in a Court, there is in fact no "past conduct" since under the Canadian Charter of Rights and Freedoms, and in particular Section 11(d) thereof, a person is presumed to be innocent until proven guilty.

In support of his submission, Mr. Lambert referred the Tribunal to an unreported decision of Mr. Justice Reid in The Peel Board of Education v. W.B. by his Litigation Guardian delivered in April of this year.

In that case, several youths were charged with quite serious offences under the Criminal Code. When the charges became known to the principal of their school, the principal immediately suspended them and proposed to expel them pursuant to the provisions of the Education Act. An appeal from that decision to suspend and to expel was taken to the Courts. The decision of Mr. Justice Reid deals with that appeal.

In an obiter dicta, Reid J. reviewed the actions of the principal to immediately suspend the pupils. At page 14 of his decision, he states:

This comes distressingly close to condemnation without trial. The principal seems to have assumed that the students were guilty simply because they were charged. That is wholly contrary to the fundamental principle of our system of justice. Everyone is presumed to be innocent until found guilty by due process of law. Had the principal not jumped to the conclusion that the students were guilty he would have had no basis for ordering their suspension. He had no other information on which to base his conclusion that their conduct was injurious to the moral tone of the school. He had therefore no basis for suspending them under s.22(1) of the Act.

...The mere fact that a student has been charged with an offense does not in my opinion, by itself, establish a basis for disciplinary action under s.22 of the Act or justify the peremptory and, indeed, arbitrary action taken by the board and its officials.

Although all the charges laid against Mr. Mann are serious, the Tribunal is particularly disturbed by the charge of conspiracy to break and enter because as a real estate salesman, Mr. Mann would have access to many residential and commercial premises. However, until proven guilty, the charges are simply allegations of a police officer. These allegations are based on what the officer believes are "reasonable and probable grounds", but the Tribunal has no information as to the nature of the evidence which leads to this conclusion.

The majority view of the Tribunal, keeping in mind the distinction drawn between this case and the Peel Board decision, is that the principles enunciated by Mr. Justice Reid apply in this case. They are an accurate statement of not only the provisions of the Charter of Rights, but the common law as well. The Registrar has made his decision as to the past conduct of the Applicant solely upon the fact of the issuance of the informations outlining the charges. In the view of the majority of the Tribunal, this fact by itself is not sufficient to prove anything other than the fact of charges having been laid. No other evidence having been presented to the Tribunal as to the past conduct of the Applicant, no grounds have therefore been presented which would create an exception to the Applicant's right to be registered under the provisions of Section 6(1) of the Real Estate and Business Brokers Act. Nevertheless, we also believe that the following terms and conditions should attach to the registration:

1. That Safeguard Real Estate Limited, Mr. Mann's intended employer provide the Registrar with an agreement in writing whereby Safeguard Real Estate Limited agrees to report in writing every month as to Mr. Mann's performance as a real estate salesman and, in particular, with respect to his compliance with the law.
2. That in the event that Mr. Mann transfers to another broker, that that broker be notified of and provided with a copy of this decision of the Tribunal, and that that broker provide the Registrar with an agreement in writing whereby that broker agrees to report in the same manner as in paragraph 1 above.
3. That these reporting requirements shall continue until such time as the pending charges against Mr. Mann are disposed of in a court of law.
4. That Mr. Mann immediately advise the Registrar of the disposition of the charges against him and the nature of the disposition.

5. That the registration of Mr. Mann be reviewed by the Registrar at that time in light of the disposition.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, and pursuant to the majority decision, Sadie Moranis dissenting, the Tribunal directs the Registrar to allow the registration of the Applicant as a real estate salesman subject to the above terms and conditions.

During the course of his argument, Mr. Lambert questioned the Registrar's right to question any applicant on any pending criminal charges in view of the Ontario Human Rights Act, but he did not pursue this matter in detail. The Tribunal assumes that he was referring to Section 4 of the Act. However, in view of its finding in this hearing, it is not necessary to deal with that matter. We mention it only to draw the attention of the Registrar to that provision.

DISSENTING DECISION

The following is the Decision of Sadie Moranis, Member.

I have read the majority decision of my colleagues in this hearing and with respect I cannot agree with their conclusion. In my opinion, the primary and paramount consideration should be the protection of the public and the maintenance of a high standard of integrity and honesty in the industry. This was and is the purpose and intent of the legislation.

At the present time, there is a serious cloud hanging over Mr. Mann. If Mr. Mann is registered, the public is being placed at potential and unnecessary risk. Furthermore, the public, being aware of the pending charges against Mr. Mann, may lose confidence in the integrity of the industry. Mr. Mann is not prohibited from seeking employment in any unregulated industry if he cannot work as a real estate salesman. A delay of registration for several months will not cause him irreparable harm. Once the charges are disposed of in his favour, he can apply for registration with a clean slate.

For these reasons, it is my opinion that the Registrar should carry out his Proposal.

SAFFET MERTEL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
JOSEPH STRUNG, Member

APPEARANCES:

SAFFET MERTEL, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 10 March 1987

Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal dated November 6th, 1986, the Registrar, Real Estate and Business Brokers, proposed to refuse registration of Saffet Mertel as a real estate salesman. The grounds for refusal, as set out in the Proposal, were twofold. Firstly, that having regard to the financial position of Mr. Mertel, he could not be reasonably expected to be financially responsible in the conduct of his business and secondly, that his past conduct afforded reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Mr. Mertel now appeals that decision.

The basic facts as set out in the Proposal were not in dispute and neither party called witnesses. However, a number of documents were filed which supported the facts and allegations contained in the Proposal.

Mr. Mertel, now 49 years old, married with two children, was first registered as a salesman under the Real Estate and Business Brokers Act in 1979. During the next several years, he progressed to associate broker and in January, 1984, to broker, being the President and sole director of Re/Max Traditional Realty Ltd., which was also registered as a broker. Mr. Mertel was apparently very

successful as a salesman and associate broker. It was stated that in both 1981 and 1982, his residential sales exceeded the \$2 million mark. Regretfully, he was not so successful in operating his own business.

On June 7th, 1984, during a routine inspection, it was discovered that a total of \$17,000 had been improperly withdrawn from the trust account of the Company and deposited into the general account to cover ordinary business expenditures. It appears that between March and June, 1984, this sum, in whole or in part, was transferred several times between the Company's trust account and its general account. On July 27th, 1984, when a second inspection took place, the trust account was again deficient in the full amount of \$17,000. On that date, the Registrar issued a freeze order on the Company's bank accounts. On August 30th, 1984, the registration of both Mr. Mertel and the Company were revoked.

On or about October 11th, 1984, Mr. Mertel, after having left Canada and then returned, filed a personal assignment in bankruptcy. The total outstanding claims amounted to some \$96,000. He received his unconditional discharge from bankruptcy in August 1985.

This was not the end of Mr. Mertel's difficulties. He was charged and convicted under the Criminal Code with breach of trust. In January, 1986, after pleading guilty, he was sentenced to 90 days imprisonment and placed on probation for 3 years. In addition, he was ordered to make restitution of the \$17,000 to the Receiver in Bankruptcy of his Company within 30 months of the sentencing date. The Company had been placed into bankruptcy by its creditors, and remains undischarged at this date. The outstanding claims against the Company total some \$130,000.

Mr. Burton, on behalf of the Registrar, submitted that these facts provided ample grounds for refusing to register Mr. Mertel.

As earlier stated, the facts as set out above were not in dispute, although there seems to be a question whether some claims against Mr. Mertel personally were actually debts solely of his Company and, therefore, counted twice. This question was not material in the Tribunal's deliberations.

In a written submission, Mr. Mertel's solicitor pointed out that the converted trust monies had not been used for personal pleasure but were used to try and keep the business afloat, that Mr. Mertel was willing to consent to any reasonable terms and conditions being attached to his registration, and that Mr. Mertel had already been severely punished for his transgressions and should not be further punished by having his application for registration as a salesman refused.

Mr. Mertel, stating that he was not a thief and noting that he had had an unblemished record while a real estate salesman, argued that the mistakes he made (which he readily admitted) were made by him as a broker in difficult financial straits and that they should not reflect on his ability to act within the law as a real estate salesman.

He said he had encountered some problems in finding a well paying job following his conviction although he is presently employed as a salesman in an import/export business and is doing very well. So well in fact, that even if he were granted registration, he said he was not sure that he would immediately leave his present position to work in the real estate field. Mr. Mertel also said that he has few assets and only a small bank account. He stated that he wanted to be registered as a salesman now so that he would have something to fall back on later if the need arose.

In reaching its decision, the Tribunal notes that Mr. Mertel has not yet made the required restitution of \$17,000 although there is some time to go before it has to be fully made. Mr. Mertel has a number of dependants and virtually no financial cushion. In these circumstances, the Tribunal is apprehensive about his future financial position. It is of the opinion that these financial concerns alone would be sufficient to support a refusal of registration under the Act. But there are other factors as well.

Mr. Mertel and his counsel laid great stress on the fact that Mr. Mertel is asking to be registered as a salesman only. The Tribunal is aware that as a salesman, Mr. Mertel should not have access to trust funds and, therefore, would have little opportunity to misuse such funds in the future.

But this is not the limit of a salesman's opportunity to act either dishonestly or without integrity. Mr. Mertel does not see himself as a thief, but the fact remains, that in a financial bind he misused trust funds and was convicted for that crime. In the eyes of the Court, he has not yet paid his debt to society and will not do so until the full sentence imposed is completely discharged. The Tribunal believes that so long as Mr. Mertel is on probation and has not made full restitution, he should not be registered under the Real Estate and Business Brokers Act in any capacity.

The Tribunal draws Mr. Mertel's attention to Section 10 of the Act which provides that further application for registration may be made where material circumstances have changed.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

THE REAL ESTATE COMPANY INC.
WILLIAM H. ROTHERNEL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
KENNETH VAN HAMME, Member
JOHN W. PATERSON, Member

APPEARANCES:

PETER FORBES, representing the Applicants

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 29 October, 20 November, 1986

Toronto

DECISION AND ORDER

WHEREAS the Tribunal issued an Interim Order dated November 12th, 1986, imposing terms and conditions on the Applicants herein and their solicitor Peter Forbes;

AND WHEREAS a further Interim Order was issued on November 20th, 1986, which provided that:

- (a) The suspension of The Real Estate Company Inc. and of William H. Rothernel shall continue pending final disposition of the appeal.
- (b) Peter Forbes, representing the Applicants, shall continue to act as trustee with reference to any commissions received by him, and as interim manager of the Company as provided in the Interim Order.
- (c) The Registrar shall hold the licences of both the Company and Mr. Rothernel pending final disposition of the appeal.

AND WHEREAS a third Interim Order was issued on December 11th, 1986, continuing the terms and conditions contained in the Interim Order dated November 20th, 1986;

AND WHEREAS Peter Forbes has discharged all his obligations as set out in that said Order;

NOW THEREFORE, the Tribunal rescinds all the Interim Orders issued by it in this matter and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act directs the Registrar to carry out the Proposal.

Released:
November 25th, 1987

MARCELINO SANTOS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
M. JEAN WORMLEY, Member

APPEARANCES:
J. KELVIN FORD, representing the Applicant
JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 1 September 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appealed to the Tribunal from the Proposal of the Registrar of Real Estate and Business Brokers to refuse him registration as a real estate salesperson.

The reason given by the Registrar in his Notice of Proposal was as follows:

In my opinion the applicant is not entitled to registration under section 6 of the act as

a) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

The underlying grounds and allegations set forth in the said Notice are these:

1) The applicant has previously been employed as a real estate salesperson and has been so registered under the act.

2) Registration of the applicant lapsed during the time in which he was in prison. He has applied for reinstatement of registration by an application dated the 4th day of March, 1987.

3) On the 6th of December, 1985 the applicant was convicted of a charge of sexual assault contrary to section 246.1 (i) of the Criminal Code. He was sentenced to two years less a day.

4) On the 29th of September, 1986 the applicant was convicted of 16 charges of fraud contrary to section 338.1 of the Criminal Code, of three charges of uttering forged documents contrary to section 26(1)(a) of the Criminal Code and of theft over \$200.00 contrary to section 294(a) of the Criminal Code. The applicant was sentenced to a period of incarceration of 15 months on each charge to be served concurrently but consecutively to the sentence being served at that time.

The circumstances of the offences giving rise to all of the charges referred to herein are such as to warrant the belief of the Registrar that the applicant will not conduct his business with honesty and integrity and in accordance with law.

The Applicant has appealed to this Tribunal from the Proposal of the Registrar of Real Estate and Business Brokers to refuse him registration as a real estate salesperson. We are asked to set that Proposal aside and pursuant to the powers vested in us by the Statute, to substitute our opinion for that of the Registrar; to find, on the evidence, that the Registrar erred making his Proposal and to quash or set the same aside.

The Tribunal notes that there has been no allegation of impropriety on the part of the Applicant in respect of his past conduct as a former registrant under the Real Estate and Business Brokers Act. In our view this is not a strong point.

Section 6(1)(b) of the aforementioned statute reads as follows:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

.

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

In our view the convictions referred to in the Proposal - and we refer to those convictions mentioned in paragraph 4 thereof - to wit, the 16 counts of fraud, the 3 counts of uttering forged documents contrary to section 26(1)(a) of the Criminal Code of Canada and the conviction on a charge of theft of over \$200.00 contrary to section 294(a) of the Criminal Code - are inescapably and unavoidably relevant to the question of his fitness to be registered under the Act regardless of the significance of the sexual assault conviction in that context.

It has been suggested in his defence, as we understand it, that the convictions resulted from guilty pleas, which were possibly entered without the Applicant's having fully appreciated the long term consequences of such pleas upon the matter we are considering at this hearing.

We cannot take that suggestion into consideration. The bare fact before us is that these twenty-two convictions resulted from the fair application of due process of law. The Tribunal has absolutely no choice, no jurisdiction, no discretion, but to assume that the Applicant was indeed guilty as charged. On that basis section 6(1)(b) certainly applies and we must conclude that the Registrar did indeed have ample grounds to conclude that the past conduct of the Applicant was such to afford reasonable belief that he would not carry on business in accordance with law and with integrity and honesty.

It is further worth noting in connection with these criminal convictions that Mr. Santos has 20 months, close to two years to go before his parole in respect to the sentence imposed for these crimes, has been completed. We perceive, in the very untimeliness of the application, a kind of insensitivity or even indifference to the seriousness of the convictions and to the underlying spirit of the law.

As we stated before in the case of Giovanni Giannini which was released on June 18, 1985, the primary function of the Tribunal is to protect the public, whose members are entitled to the assurance that a regulated industry [in this case the real estate sales industry] will be carried on by strictly honest men and women whom the public may look to for advice and honest counsel with complete confidence.

In short, the public must be protected regardless of individual interest.

Therefore by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal and refuse registration to the Applicant.

DANIEL TESSIER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROLAND C. BRENNING, Member

APPEARANCES:

HOWARD YEGENDORF, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 19, 20 October 1987

Ottawa

REASONS FOR DECISION AND ORDER

The Applicant, Daniel Tessier, born in July 1960 applied for registration as a real estate salesperson having completed the real estate salesperson's course and having obtained 98% in the qualifying examination. The Registrar of Real Estate and Business Brokers responded by issuing a Proposal to refuse registration.

There were several reasons put forward by the Registrar in his Proposal. In our view, the principal objection is that the Applicant was convicted in April 1986 of an offence under the Narcotics Control Act, to wit, having in possession for the purposes of trafficking a large quantity of cannabis resin, to wit, 2.2 pounds or one kilogram of hashish. He was sentenced to nine months imprisonment to be followed by two years probation upon certain conditions and under supervision.

The Registrar was also dissatisfied with the fact that the Applicant failed, in completing the form of application for registration, to answer question 7 as fully as the Registrar would have wished. That question reads:

Have you ever been convicted under any law of any country or state or province thereof of an offence or are there any proceedings now pending? If yes, give

full particulars of all such convictions and proceedings on a separate sheet.

Mr. Tessier attached a separate sheet to his form of application upon which he provided some details of the April, 1986 conviction mentioned above but made no reference to any other convictions. In fact, Tessier was found guilty in 1982 of an earlier and similiar offence under the said Narcotics Control Act and given a conditional discharge which, as we are satisfied upon the evidence led before us, does not amount to "criminal conviction" in the sense that it would lead to a "criminal record." Consequently, we cannot agree with the Registrar's assertion in his Proposal, that a "false answer" was thereby given in the application deliberately or otherwise. This is a somewhat moot point, but we will not condemn Mr. Tessier for having kept silent concerning it, especially in view of his understanding of the meaning and consequences of a conditional discharge as these had been communicated to him in Court when he received it.

The Applicant graduated with a grade 12 diploma in 1978. Since then his employment record has been very sporadic. He spent a few weeks in life insurance sales. Subsequently, early in 1982, after a few miscellaneous jobs, he passed a course at St. Lawrence College and went to work for Via Rail in Montreal, a city which he says had been previously unfamiliar to him. When that employment came to an end, it seems from our interpretation of the evidence, Mr. Tessier's serious involvement with what has been called the "drug subculture" probably began.

During this period, from late 1982 until his incarceration in 1986, as mentioned above, it is our impression that Tessier's spending was high, that his ostensible and visible earnings were low. For example, he allegedly purchased on or about July 4th, 1985, a Toyota Supra motor car at a total cost of around \$22,000. He has admitted that his relatively high living expenses during this period were financed in part from his illicit earnings derived from drug trafficking and supplemented by loans and gifts advanced by his mother.

In this connection, we note that his family background is somewhat fractured; that his mother is a successful registered real estate salesperson earning between \$50,000 to \$100,000 a year, and also that his three brothers appear to be all resourceful, industrious and financially successful individuals.

At the time of his conviction and incarceration in April 1986, he appears to have accumulated a number of debts, in our view not exceptionably high, and to have what the Registrar thinks is a poor employment record. On that basis the Registrar feels, as shown in the reasons for Proposal, that he has demonstrated a lack of financial responsibility or a financial position to be impugned within the scope and meaning of Section 6(1)(a) of the Statute. The Tribunal disagrees with that perception and respectfully rejects it.

The entry requirements for this industry are succinctly stated at Section 6 of the Statute, the parts of which are relevant to our present purposes read as follows:

- 6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

In our view, the past conduct of the Applicant, the past conduct which has resulted in his aforesaid conviction and his having being placed on probation, does afford reasonable grounds for a certain degree of belief that he might not carry on business in accordance with law and with integrity and honesty. We will be specific. His disregard for the law in that he knowingly broke the Narcotics Control Act at that point in time might well have afforded reasonable belief that he might not carry on business in accordance with law.

The Tribunal, however, is satisfied that Tessier is not a violent man. There has been no allegations of past crimes of violence nor do we assess him as a character of that ilk. Nor is there any evidence of crimes against property, such as theft or fraud. In our assessment, the drug crime was the crime of a weak character and an immature one. It was what we are prepared to call, in colourful language currently being used, "a sleazy crime" in no way consonant or consistent with

the most modest definition of the word "integrity". In our opinion, based on our assessment of this Applicant from his deportment in the witness box and from the evidence, he is by no means an "ideal" candidate for admission to this industry and we share some of the Registrar's misgivings.

But on the other hand, the Applicant is not a candidate for some kind of civic award for outstanding public service or something of that sort. He is merely a candidate for registration in a regulated industry in which he feels he can apply what he and his Probation Officer feel are his natural aptitudes.

What we believe is that Mr. Tessier is an immature character, which is another way of saying that his development as an individual is still very much an ongoing process. This conclusion is based upon our assessment of him, reinforced by the testimony of his Parole Officer, Mr. J.P. Annett who referred to a probation officer's job as being, in part, "to help people grow up." He also says that the word "probation" is derived from a Latin word meaning "to prove" or, in this context, "to prove oneself."

We do not think that Mr. Tessier has up to this time proven himself to be ready for registration in this industry, and yet, we do not feel that his past conduct has been such as to afford reasonable belief that he will never be likely to carry on business in accordance with law and with integrity and honesty. To the contrary, we see many omens in his most recent past conduct to lead us to a reasonable belief that the opposite is going to prove to be the case, that is, that he will in future conform to the statutory requirements to adherence to law and to integrity and honesty. We say this because we can perceive a high motivation on Tessier's part to be a real estate salesperson and the high desire to succeed in life as his brothers have done and, in this industry, as his mother has done.

We also believe that the punishment he has experienced has in all probability produced a positive or beneficial effect and will have largely achieved its reforming and improving purposes. Of course we share the Registrar's concern for the protection of the public. But when the probation period is over, and always provided that the exacting terms imposed by the judge in imposing that probation Order will have been fulfilled and, moreover, provided that there are no relapses in his conduct during the next twelve months, we are inclined to

believe that the Applicant shall have sufficiently matured in a positive way, to have lived down the negative impact of his past conduct.

In short, unless the Registrar can show that the record of the past conduct of the Applicant as of October 17th, 1988, has been further blemished by bad conduct recorded between now and then, we feel that the Registrar should admit him to this industry as a salesman and we therefore direct him so to do provided the Applicant at that time shall make a fresh application. We also direct the Registrar to waive the requirement that Tessier rewrite the qualifying examination which he has already passed provided he seeks application within the period of 60 days immediately following October 16th, 1988.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to register the Applicant subsequent to the completion of his parole and provided the Registrar has no fresh evidence of misconduct during the next year, and if the Applicant makes a fresh application during the 60 days immediately following October 16th, 1988, and, further, in such case, to waive the entrance examination which the Applicant has already passed.

(As a postscript to the foregoing, we have in hand Exhibit 13, a written undertaking by Germaine Tessier in the following words, "Should Daniel Tessier be given his Real Estate license, I am willing and able to help him financially until he is established in the real estate business." A further condition of registration will be that this undertaking shall remain in full force and effect.)

GARY BRIAN WILLIAMSON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
JAMES A. CATHCART, Member

APPEARANCES:
GARY BRIAN WILLIAMSON, appearing on his own behalf
JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF HEARING: 19 June 1987 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Gary B. Williamson, has applied for registration as a salesman pursuant to the Real Estate and Business Brokers Act. The Registrar has issued a Proposal to refuse to grant the Applicant such registration on the grounds that:

- (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and
- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

While these two grounds are cited by the Registrar in his Proposal, most, if not all of the evidence and argument put forward on behalf of the Registrar was related to the second ground.

In 1985, the Applicant pleaded guilty to nine counts of fraud contrary to the Criminal Code. These convictions arose out of Mr. Williamson's employment with the Argosy Financial Group of Canada.

The Applicant joined Argosy in September 1974 when he was 27 years of age and resigned from that Company in December 1979. In 1976 Argosy moved into the field of syndicated mortgages and was eventually found to have defrauded over one thousand investors of a total of over \$24,000,000. The underlying scheme involved the holding out to investors of an opportunity to invest in specific construction projects, secured by the equity in that project. In fact, monies raised from investors went into Argosy's general bank account and were used according to the corporate needs of Argosy and the personal needs of its principals.

Following Mr. Williamson's guilty plea on March 5th, 1985, the Crown Attorney made submissions to the Court which were accepted by Mr. Williamson at that time through his counsel as being substantially correct. The submissions included the following passages:

...it is not the Crown's allegation that Mr. Williamson was involved in the front end. He was not involved in the marketing end. He was involved in the administration of the funds after they had been received from the public, but he administered those funds in a manner which was not consistent with the reason for which it had been obtained in the first place, and he knew that he was administering those funds in a manner not consistent with the reason for which it had been obtained.

.....

When Argosy in 1976 moved into the field of syndicated mortgages, Mr. Williamson took on the responsibility of administering those mortgages, in overseeing the projects and dispersing the funds. Mr. Williamson like his co-accused Mr. Valleau who was sentenced some time ago, was young and ambitious. It is the Crown's allegation that he fell under the spell of the major Argosy principal and that along with the lure of salary, title and power, proved to him to be a temptation he couldn't overcome. He rose rapidly in the company. He eventually became Vice-President and

General Manager. At that point, I would indicate to your lordship those titles while sounding good on paper perhaps were not as powerful as they might indicate in that Mr. Williamson did report directly to the directing mind of the major Argosy principal and it was he who decided what the company was to do and how it was to be done. However, in the role as Vice-President and General Manager, Mr. Williamson became the number two man in the organization and in that role he was acutely aware of the Argosy scheme. He knew the money he was dispersing had been received from investors and knew it was not being dispersed in the terms promised to them. He was totally aware of the Argosy mortgage portfolio in Ontario. In fact, in the early stages of its development he worked hand in glove with the major Argosy principal to perfect it. As the program continued, his involvement touched every aspect, signed commitment letters, re-negotiated loans, signed disbursements for advances knowing no project reports had ever been received and that there were prior encumbrances which put the money at high risk. He was reporting directly to the major Argosy principal and in fact his authority was only as strong as the directions he received from that principal. But Mr. Williamson, nevertheless, knew what he was doing was fraudulent and he willingly participated in the scheme.

He has entered a plea of guilty to nine counts of fraud. I would indicate to your lordship that they represent eight separate projects in Ontario and the sale of debentures. As I have indicated before it is an amount totalling approximately thirteen million dollars.

.....

I would indicate, however, that Mr. Williamson did divert some of the investor's money to his own use. Now in

fairness to Mr. Williamson I would indicate the amount was insignificant when compared to that diverted by the major Argosy principal. Nevertheless, Mr. Williamson did receive a sum of money and his hidden interest in various of these projects has had the potential of gaining for him even greater amounts.

Mr. Williamson's basic submission to the Tribunal was that in considering his eligibility for registration, it should have regard to his more recent past conduct rather than focusing on the Argosy scenario which took place some seven and one-half years ago. He submits that since leaving Argosy in 1979, his conduct has been such as to demonstrate that he is responsible and trustworthy.

In support of his appeal, Mr. Williamson filed three "letters of reference" with the Tribunal. Two of these were from former employers. Mr. Williamson was employed with Rockett Lumber & Building Supplies Limited from the fall of 1982 until late summer 1983. The letter from that Company indicates that Mr. Williamson worked with various project consultants with respect to a "MURB" subdivision called Bent Pine Estates. This letter states that Mr. Williamson demonstrated "a responsible and trustworthy work ethic" to his employer during the period of his employment.

The second letter is from Anworld Consultants Inc., by whom Mr. Williamson was employed from October 1985 until May 1986 as a sales representative directly selling his employer's new homes to the public. This letter describes Mr. Williamson as an excellent salesperson. As Mr. Williamson has never been registered as a salesman under the Act, this eight month period with Anworld Consultants Inc. appears to be his only experience to date in the field of real estate sales.

The third letter of reference is from a personal acquaintance, Mr. J.C. Gibson of J.C. Gibson Real Estate Limited. Mr. Gibson indicates that he has known Mr. Williamson for the last six years and states that he is of the opinion that Mr. Williamson would provide service to the public with honesty and integrity.

The Tribunal also heard the evidence of the Applicant's uncle, Mr. G.R. Williamson, a broker registered under the Act. This witness testified that it was his belief that the Applicant had been manipulated by his superior in the

Argosy situation. He also testified that he believed that the Applicant had now matured into a responsible person and would not repeat his past mistakes.

At present the Applicant is employed as a salesperson by Northern Telecom. While he indicates that he has achieved some success in that position, he says that he does not find his work with that Company satisfying or his level of income satisfactory.

The evidence put forward by the Applicant indicates that he is well thought of by a number of persons with whom he has had a business or personal relationship and these opinions must be taken into account by the Tribunal in arriving at its decision.

The Tribunal must also give careful consideration to the fact that the charges of which the Applicant was convicted in 1985, and for which he served a prison sentence, arose directly as the result of his actions in breach of the public trust. The regulation of the real estate industry is motivated precisely by the need to protect innocent members of the public from being victimized by persons who would breach the public trust.

In its decision in the case of Giovanni Giannini (14 CRAT, p.179), the Tribunal stated:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved. Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today...

In the case of Ronald W. Northover (13 CRAT, p.292), the Tribunal's reasons for refusing to grant registration to a Applicant included the following passage:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

These principles have been expressed by the Tribunal on many occasions.

In the present case, while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

The Tribunal must also take into account the potential damage to the public's perception of and confidence in the industry which the registration of persons convicted of fraud, particularly in the context of a situation as notorious as the Argosy collapse, would have.

The Tribunal has also considered the fact that there are alternative career paths available to the Applicant which could permit him to continue his rehabilitation and allow him to achieve the success and job satisfaction that he desires, options which do not require that he be placed in a position of public trust.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

RICK FISK

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
KEITH COPPARD, Member

APPEARANCES:

RICK FISK, appearing on his own behalf

MICHAEL D. LIPTON, Q.C.,
representing the Board of Trustees

DATE OF

HEARING: 29 September 1987

Toronto

REASONS FOR DECISION AND ORDER

The facts in this case are not in dispute.

In November, 1986, Rick Fisk, the claimant herein, purchased travel services from Ventura International Tours Inc in Markham. The departure date for the vacation was to be March 21st, 1987.

According to the Director's Certificate, filed as Exhibit 7, Ventura was registered under the Travel Industry Act solely as a travel wholesaler and its registration was terminated on March 13th, 1987.

The Tribunal does not know under what circumstances or representations the travel services were sold to Mr. Fisk. However, he testified that he had no knowledge of any problems relating to his prepaid vacation until two days prior to departure. At that time, he was contacted by someone from Sunquest Vacations and was told that Sunquest was taking over the vacation arrangements from Ventura and that unless he paid an additional \$1,600, he could not have accommodation or meals for his trip. Mr. Fisk also said that he was told by persons from Sunquest and Ventura that such payment could be recovered from the Compensation Fund established under the Act.

Mr. Fisk paid the additional \$1,600, went on his vacation, and upon his return, filed a claim for the refund.

He was advised by the Trustees of the Fund that his claim would not be allowed as under the terms and conditions of the Compensation Fund, and in particular, Section 15(1), paragraph 1 thereof, only those persons buying travel services from a travel agent were eligible for refunds in the event the services were not provided.

Mr. Fisk now appeals that decision to this Tribunal.

Mr. Lipton, counsel for the Board of Trustees, by way of a preliminary motion, outlined the history of the paragraph in question. He said that prior to 1984, paragraph 1 spoke only of services purchased from a 'participant' in the Fund. Under the definition contained in the Schedule to the Regulations, a 'participant' included and continues to include both travel agents and travel wholesalers. In 1981 this Tribunal, dealing with a somewhat similiar situation, found that travel services, purchased from a travel wholesaler who failed to provide the services, were covered by the Fund.

Subsequently, apparently at the urging of the travel industry, the paragraph was amended to read as it now does, which is in part as follows:

15(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario...

(emphasis added)

The intended purpose of the Travel Industry Act was to create appropriate standards of conduct for the industry and to protect consumers against substandard conduct of those engaged in the business. Under the definition section of the Act, travel agents alone are authorized to sell travel services to the general consuming public. Travel wholesalers are defined as persons who sell travel services to other wholesalers or travel agents. However, there is nothing in the statute, even

after the 1986 amendments to the Act, which specifically prohibits a travel wholesaler from selling travel services to the public. Although the registration certificate is required to be posted, there is nothing in the Act or regulations that requires the travel wholesaler to clearly inform the consumer that he is a travel wholesaler only and, therefore, may not sell travel services to the public. There is nothing in the Act that prohibits a person from holding dual registration and some persons are concurrently registered as both travel agents and travel wholesalers.

Whether the general consuming public is aware or should be aware of the distinction between a travel agent and a travel wholesaler is a moot point. In our opinion, the current situation may lead to some confusion.

Nevertheless the applicable provisions are quite clear that only persons purchasing services from travel agents are eligible to recover from the Fund. Unfortunately, Mr. Fisk is not such a person and his must claim be be denied.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim

RAY SPANGLER

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
TIBOR P. GREGOR, Member
JOHN H. AUSTIN, Member

APPEARANCES:

MICHAEL D. LIPTON, Q.C.,
representing the Board of Trustees

No one appearing for the Applicant

DATE OF

HEARING: 6 October 1987

Toronto

REASONS FOR DECISION AND ORDER

A hearing of this appeal was to commence at 9:30 a.m. on October 6th, 1987. After waiting an additional thirty minutes, the Tribunal commenced the hearing. The Registrar for the Tribunal filed as Exhibit 4, the Affidavit of Service of the Appointment For and Notice of Hearing on Ray Spangler, the Applicant herein. The Tribunal was advised that Mr. Spangler was not present. Since Mr. Lipton had been advised that the Applicant would attend the hearing, the Tribunal recessed for a further thirty minutes.

On reconvening, the Tribunal again noted that Mr. Spangler was not present. The Notice of Hearing states that:

If you do not attend at the hearing,
the Commercial Registration Appeal
Tribunal may proceed in your absence and
you will not be entitled to any further
notice in the proceedings.

The Tribunal, therefore, dismisses the appeal of the Applicant and by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim.

JACK AND PHYLLIS WALRATH

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
KEITH COPPARD, Member

APPEARANCES:

JACK AND PHYLLIS WALRATH,
appearing on their own behalf

MICHAEL D. LIPTON, Q.C.,
representing the Board of Trustees

DATE OF

HEARING: 3 November 1987

Toronto

REASONS FOR DECISION AND ORDER

John Walrath is a minister and superintendent of the Free Methodist Church in Cymric, Saskatchewan. Some years ago, while in Ottawa, he met a tour operator, Wayne Campbell. As a result of this meeting, Rev. Walrath and his wife Phyllis became involved in organizing tour groups to the Middle East and elsewhere. The actual travel agent appears to have been Campbell Fellowship Tours International Inc., operating as Christian Fellowship Tours. In return for organizing these groups, the Walraths obtained free passage for each trip and a commission based on the number of persons signed up for the group tour from the travel agent. Over the years, some 15 group tours were arranged and successfully carried out to the satisfaction of all parties involved. The Walraths developed a good reputation as organizers and tour hosts and they apparently had a core group of some 800 individuals whom they contacted whenever a new tour was being organized.

In 1986, the Walraths began organizing a group for a trip to England and Scotland. They contacted their core group and others, collected payment for the trip from 27 individuals, transferred from time to time part of these monies to Chippawa Travel, which was also operated by Mr. Campbell, and made final preparations to leave on the scheduled departure date. However, a few days before the departure date, Rev. Walrath learned that both Christian Fellowship Tours and Chippawa

Travel had gone into receivership. Rather than aborting the trip, Rev. Walrath made arrangements with other suppliers of travel services and the tour continued as scheduled. According to the documentation in Exhibit 4, the total cost for obtaining travel services for the group from the other suppliers, including the costs of the Walrath's trip, was \$66,322.25. However, when the sum of \$32,500, which was the sum earlier transferred to Chippawa Travel, is added to that amount, the total cost is \$98,822.25. The Walraths had only collected \$74,859.05 so that their final, out-of-pocket loss appears to be \$23,863.20 although their claim against the Compensation Fund is for \$32,500.00. (There are some discrepancies in the numbers in Exhibit 4, however, the figures shown are reasonably accurate for purposes of these reasons.) The Walraths also filed separate claims for their personal travel costs in the amount of \$5,696.00. This amount is included in the \$23,863.20 figure.

By letter dated February 20th, 1987, the Board of Trustees of the Compensation Fund rejected all the Walrath claims on the grounds that "...it was the opinion of the Board that this is a 'commercial debt' between yourselves and Christian Fellowship Tours and that you were acting as a travel agent in the Province of Saskatchewan."

This is the decision which is now being appealed to this Tribunal.

Under the "Terms of Compensation Fund", which is part of the Regulation under the Travel Industry Act, only three categories of persons are entitled to payment out of the Compensation Fund - a client, a participant who is a travel agent; or a participant who is a travel wholesaler.

A 'participant' is defined in the Regulation in Section 1 of the Schedule to mean "any travel agent or travel wholesaler who is a subscriber to the fund with the approval of the Registrar." The Walraths are not subscribers to the Fund and are therefore not 'participants'. Consequently, they are not eligible for payment under Section 15(2) or 15(3) of the Schedule even if all other criteria or requirements specified in those subsections were met.

The only other subsection under which the Walraths might qualify is under subsection 1 of Section 15 if they are found to be 'clients.'

In the opinion of the Board of Trustees, the Walraths were not clients but unregistered travel agents. On the basis of the evidence before it, the Tribunal does not agree with that opinion. After reviewing the testimony of the Walraths related to their activities in organizing the groups, the Tribunal was struck by the similarity of these activities with those described in an earlier decision Lawson McKay Tours, 11 CRAT, 212. In that case, a minister of the Presbyterian Church organized tours and it was argued that he was an unregistered travel agent. The Tribunal rejected that argument because although the activities "exceeded the kind of effort which could in the ordinary course be expected from a travel agent", the minister did not execute the provision of any travel service. The Tribunal went on to say that, "... 'promotion', the 'stimulating of interest' as performed by Rev. Johnston were not equivalent to the 'business of selling' within the meaning of Section 1(e)."

However, our disagreement with the Board in this respect does not mean that the Walraths are therefore 'clients'. Again in the Lawson McKay decision, the Tribunal determined that in order to have a 'client' relationship with a travel agent there must be 'an element...of the engagement of the professional advice or services of another'... 'that the person was a party to a direct contract for travel services'. These elements are lacking in the present situation. On the evidence before it, the Tribunal cannot conclude that the Walraths were 'clients' of either Chippawa Travel or Christian Fellowship Tours. They may have been 'travel salesmen' as defined in the Act or independent contractors as found in the Rea decision, but they were not 'clients'.

In the course of its deliberations, the Tribunal considered whether the Walraths could be said to have been acting as agents for the individual clients. There was no evidence before it to support such a conclusion, but even if there had been, the fact remains that each client paid for his or her trip and received that trip. Therefore, there is no claim against the Compensation Fund in respect of such services.

The Walraths acted out of a perceived moral obligation to save the tour. As a result, they have lost a considerable sum of money. Regrettably, in their specific circumstances, they have no recourse against the Compensation Fund.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim

R.B. WARMAN

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR P. GREGOR, Member
ARTHUR GARNER, Member

APPEARANCES:

LOUISE J. REHAK, representing the Applicant

MICHAEL D. LIPTON, Q.C.,
representing the Board of Trustees

DATE OF

HEARING: 21 October 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Decision of the Board of Trustees refusing the Applicant's claim against the Compensation Fund.

The Applicant first met George Wong in 1977. At that time he retained Mr. Wong, who is an accountant, to prepare his income tax return. Over the years, Mr. Wong continued to prepare Mr. Warman's tax return and also provided services to Mr. Warman's father. Mr. Wong gained the trust and confidence of Mr. Warman and his family. Mr. Warman was aware that Mr. Wong had acquired a travel agency, namely Alpha Travel Service.

Alpha Travel Service was registered as a travel agent under the Travel Industry Act from September 5th, 1983, until January 2nd, 1987. Mr. Wong was also the principal of Alpha Tours Inc., which was a registered travel wholesaler under the Act from January 21st, 1985, until January 2nd, 1987.

In the spring of 1985, Mr. Wong approached Mr. Warman with an investment proposal. Mr. Wong's idea was to create, package and market a collision damage waiver ("CDW") insurance package which could be offered by Alpha Tours to retail travel agencies who would in turn sell the package directly to the travel customers who intended to rent cars on their trips. Mr. Wong testified that he was trying to raise approximately \$100,000 from investors as seed money for the venture. He

hoped to attract four investors, each of whom would invest \$25,000. One of the people Mr. Wong approached was Mr. Warman. Mr. Warman found the proposal attractive and promising; however, he did not have funds available to invest.

Mr. Warman testified that at the same time that he was considering investing in the "CDW" venture, he had discussions with Mr. Wong regarding travel possibilities for himself and his family. Although Mr. Warman and his wife had never travelled, they wanted to do so in the future.

In or about September 1985, after discussing the matter with his wife, Mr. Warman decided to give Mr. Wong \$25,000. Mr. and Mrs. Warman re-mortgaged their home to raise \$20,000 and that amount was paid over to Alpha Travel in September 1985. The remaining \$5,000 was to have been paid in October 1985, but was never paid over. Mr. Warman testified that he agreed with George Wong that 50% of the \$25,000 amount would be invested in the "CDW" venture and the remaining 50% would be paid for a future travel package. Of the \$20,000 that was paid to Alpha Travel in September 1985, Mr. Warman testified that \$7,500, by cheque dated September 20th, 1985, was paid as an investment in the "CDW" venture and \$12,500, by cheque dated September 6th, 1985, was paid for a future travel package. Two separate cheques were written for these amounts with the notation "travel package" written on the cheque in the sum of \$12,500, and the notation "CDW venture" on the cheque for \$7,500. The cheques were similarly designated in the accompanying letter which Mr. Warman sent to Alpha Travel dated September 4th, 1985.

Mr. Wong, in his evidence, testified that all the funds which he received from Mr. Warman were intended for the "CDW" venture and not for travel. He does not recall receiving the September 4th, 1985 letter. Mr. Wong does admit that he told Mr. Warman that he would hold himself personally responsible for one-half of the proposed investment, that is, he would be personally responsible for the \$12,500.

Although Mr. Warman states that \$12,500 was paid by him in advance on account of 'a travel package', no attempt was made by him or his wife to actually book any specific travel services until over fourteen months later in December 1986. The Tribunal has some difficulty in understanding why Mr. Warman would go to the extent of re-mortgaging his home in order to pay over \$12,500 to Alpha Travel for an unspecified travel package. Mr. Warman testified that he did so because Mr. Wong promised to provide him with first class travel at

economy rates if he made the advance deposit. Mr. Warman explains that there were various family reasons why he and his wife could not make any specific travel arrangements before December 1986.

In the summer of 1986, Mr. Warman started to get somewhat concerned about the funds paid over to Alpha Travel. The "CDW" venture had not been set up, and as the summer went on, he found it difficult to contact George Wong, who, he was told, was in Europe on an assignment.

At no time did Alpha Travel issue an invoice to Mr. Warman for travel services or provide him with a receipt or other written acknowledgement confirming that the sum of \$12,500 was a deposit on account of future travel services.

Finally in early December, 1986, Mr. Warman attempted to book a trip to Barbados through Alpha Travel. Mr. Wong was still in Europe and Mr. Warman dealt with an employee of the agency, Marilyn McDermott. Mr. Warman told her that Mr. Wong would pay for the Barbados trip. Ms. McDermott contacted Mr. Wong in Europe. He told her that he was not in a position to pay for the trips and, therefore, the bookings were cancelled.

In early December 1986, Mr. Warman also learned that George Wong had persuaded his employees Marilyn McDermott and Diane Petrie to invest funds in the travel agency. Each of them had invested \$10,000. Ms. Petrie recommended to Mr. Warman that he consult her solicitor. (Subsequently Mr. Warman obtained a judgment against Alpha Travel Services for \$20,000. As a result of a special private arrangement that he made with Ms. Petrie, he received only 30% of the amount of the judgment as the result of garnishment proceedings with Ms. Petrie receiving 10%. Under the provisions of the Creditors Relief Act, he would have been entitled to 66 2/3% of the proceeds. He received \$3,500 as a result of the civil proceedings instead of the \$8,000 he would have received but for his private agreement with Ms. Petrie.)

On December 15th, 1986, Mr. Warman wrote a letter to Alpha Travel purporting to book three trips, for himself and his family, having a total value of \$20,000. In the same letter, he directed that his "CDW" funds be transferred immediately to his travel account. The Tribunal considers this letter to be a self-serving one written by Mr. Warman as an attempt to create some basis for a claim that the funds he had given to Alpha Travel over fourteen months earlier were funds paid over on account of travel services.

Ms. McDermott testified that in her six years of experience as a travel agent, she had never had or been aware of a travel client advancing a large amount of money to an agency for travel purposes without specifying travel dates, destinations or services to be provided. She testified that the standard procedure utilized at Alpha Travel Service by the travel agents was to book a specific trip for a client, require the client to pay an initial 'deposit' by the option date designated by the tour operator and the balance by a subsequent deadline date prior to the departure date. She testified that invoices were always issued at the time deposits were received. She opined that it would be "ridiculous" for a travel client to pay in advance for unspecified future travel.

The Tribunal also heard the evidence of Mr. John Buckley, Assistant-Registrar, Travel Industry Act. Mr. Buckley has over thirty years experience in the travel industry. He stated that in his experience, he had never encountered a situation where a travel client had made an advance payment for unspecified future travel. He stated that he considered the possibility of such an arrangement to be "incredible" since there would be no reason or advantage to making an advance payment.

Mr. Warman appears to this Tribunal to be a responsible, hardworking person who has managed to rise through the ranks at Bell Canada where he is presently employed as a marketing manager. He was astute enough regarding business matters to form his own consulting company in the 1970's as a tax write-off vehicle. He has taken courses on entrepreneurship. He espouses the philosophy, in his own words, that "if you don't take a shot in life you don't make money." The Tribunal finds it very difficult to accept that a person as astute as Mr. Warman would refinance the mortgage on his home in order to pay a large sum of money in advance to a travel agency for no other reason than as a deposit on account of unspecified, unbooked future travel. That is not a reasonable action for a reasonably astute and sophisticated business person.

The Tribunal finds that while Mr. Warman may have had some secondary expectation of travel benefits from Mr. Wong as an additional 'perk' to his investment, or alternatively, as a method by which Mr. Wong could personally guarantee one-half of the investment, the primary purpose for the payment of funds to Alpha Travel was investment and not, as required by Section 15(1)1. of the Schedule to the Regulations, payment for travel services contracted for.

In the case before the Tribunal, no travel services were contracted for at the time the payment was made or within a reasonable time thereafter. The nebulous 'future travel' promised to Mr. Warman is not, in the Tribunal's view, within the category protected by the Compensation Fund. A participant and claimant cannot cloak their arrangement with the protection of the Compensation Fund by making some private contingent arrangements for future travel. As stated by this Tribunal in past decisions, the legislation is consumer protection legislation intended to protect consumers not investors. An investor by including in the overall investment arrangement some possibility of travel at reduced cost, cannot transform what is in essence an investor relationship with a participant into one of participant-client.

The Tribunal finds that a payment made to a travel agency for unbooked, unspecified future travel and for which no invoice or other confirmation has been issued by the travel agency at the time of the payment or within a reasonable period of time thereafter is not a payment of the type which the Compensation Fund is intended to protect.

The onus is on the Applicant to satisfy the Tribunal on the balance of probabilities, that his claim falls within the ambit of Section 15(1) of the Schedule and the Applicant has failed to satisfy this onus.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal confirms the Decision of the Board of Trustees refusing the Applicant's claim.

STEVE ASLANIDIS
(THESSALONIKI-SKG TRAVEL SERVICE)

HEARING TO CONSIDER AN APPLICATION
FOR A STAY BY THE APPLICANT OF THE ORDER OF
THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT
FOR IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
KENNETH VANHAMME, Member
KEITH COPPARD, Member

COUNSEL: J. AMOURGIS, representing the Applicant
GAIL MIDANIK, representing the
the Registrar under the Travel Industry Act

DATE OF
HEARING: 16 December 1986 Toronto

REASONS FOR ADJOURNMENT AND ORDER

The Applicant Steve Aslanidis, carrying on business as Thessaloniki-SKG Travel Service, has filed an appeal from the Proposal of the Registrar under the Travel Industry Act to revoke his registration. In addition to the Proposal, the Registrar also issued an immediate temporary suspension order. Such order, when an appeal has been filed, would automatically expire 15 days' thereafter unless the Tribunal extended the time of expiration in accordance with Section 7 of the Travel Industry Act.

The hearing today, therefore, was not for purposes of determining the issue related to the Proposal but to decide whether or not to extend the temporary suspension order pending a full hearing of the matter. Evidence was presented by the accountant for the registrant that substantially all the financial information has been filed although it is unaudited. There is no evidence of any shortfall in the trust account and, indeed, the opposite appears to be the case.

There have been no complaints from the public with reference to this registrant.

The Tribunal in deciding must weigh the balance of interest as between the registrant and the public, and in this case, the Tribunal has concluded that the public would not be at any risk pending final determination of this issue.

The Tribunal, therefore, adjourns the main hearing sine die to be brought back on ten days' notice to a date fixed by the Registrar. The Tribunal further orders by virtue of the authority vested in it under section 7 of the Travel Industry Act that the order of interim suspension be and the same is hereby rescinded. The Registrar will re-schedule the hearing as quickly as possible.

MAURICE L. COHEN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
RICHARD F. STEPHENSON, Member
SADIE MORANIS, Member

APPEARANCES:

NATALIE BRONSTEIN, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 4, 5 November 1987

Toronto

RULING

On June 10th, 1987, the Registrar, Real Estate and Business Brokers, issued a Notice of Proposal to revoke the registration of Maurice L. Cohen, a salesman registered under the Real Estate and Business Brokers Act. A Notice of Appeal was filed by Mr. Cohen and the matter came before this Tribunal for a hearing on November 4th, 1987. After two days of hearing evidence and submissions, the Tribunal adjourned the matter and reserved its decision.

By letter dated November 19th, 1987 before a decision was rendered, the Registrar of this Tribunal and subsequently the panel hearing the matter, were advised that Mr. Cohen's registration as a real estate salesman had automatically terminated on October 4th, 1987, because Mr. Cohen had failed to apply for renewal of registration as required by the Act.

Therefore, as of the date of the hearing, Mr. Cohen was not a registered salesman under the Real Estate and Business Brokers Act. Accordingly, the Tribunal had no jurisdiction to hear the appeal or to render a decision in the matter in these circumstances.

The file with respect to the appeal to revoke registration is therefore closed.

ANDY HADJIYANNAKIS
(BOLOS TRAVEL SERVICE)

HEARING TO CONSIDER AN APPLICATION
FOR A STAY BY THE APPLICANT OF THE ORDER OF
THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT
FOR IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., Chairman, Presiding
KENNETH VANHAMME, Member
KEITH COPPARD, Member

COUNSEL: BRIAN A. BANFIELD, representing the Applicant
GAIL MIDANIK, representing the
the Registrar under the Travel Industry Act

DATE OF
HEARING: 16 December 1986 Toronto

REASONS FOR ADJOURNMENT AND ORDER

The Applicant Andy Hadjiyannakis, carrying on business as Bolos Travel Service, has filed an appeal from the Proposal of the Registrar under the Travel Industry Act to revoke his registration. In addition to the Proposal, the Registrar has also issued an immediate temporary suspension order. Such order, when an appeal has been filed, would automatically expire 15 days' thereafter unless the Tribunal extended the time of expiration in accordance with Section 7 of the Travel Industry Act.

The hearing today, therefore, was not for the purpose of determining the issue related to the Proposal but to decide whether or not to extend the temporary suspension order pending a full hearing of the matter. Evidence was presented by the Applicant as to its financial responsibility. The Tribunal has some concern about this evidence, however, its decision does not rest on this issue alone. The Tribunal has formed the impression that the operation of the business was left in the hands of the Manager of the office with little or no supervision by the registrant. Business in the past has not been carried out in accordance with the Act. Although, the Tribunal has been assured that the registrant will supervise

the operation more closely in the future, the Tribunal is not satisfied that the business will be carried out with the degree of integrity and adherence to the letter of the law as required by the Act.

The Tribunal accepts that there have been no complaints filed by the general public. However, it is concerned about the overall direction and operation of the business. In reaching its decision, the Tribunal must weigh the balance of interest between the registrant and the public. In this case, the Tribunal has concluded that it would be in the public interest to extend the suspension order pending final disposition of the appeal.

Therefore, this Tribunal adjourns the hearing sine die to be brought back on ten days' notice to a date fixed by the Registrar. The Tribunal further orders that by virtue of the authority vested in it under section 7 of the Travel Industry Act that the time of expiration of the order of interim suspension be and the same is hereby extended until the hearing is concluded. The Registrar of the Tribunal will re-schedule the hearing as quickly as possible to accommodate all the parties.

REGINALD HEASMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:
REGINALD HEASMAN, on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 25 August 1987 Toronto

REASONS FOR RULING

At the outset of this hearing, the Tribunal has been presented with a preliminary motion brought on behalf of the Respondent Warranty Program being a motion for the adjournment of this hearing pending the disposition of an action and counterclaim which has been instituted (more or less concurrently with the present claim) before the Supreme Court of Ontario. The claim before the Supreme Court is, as we are told by counsel for the Warranty Program, a wider and more comprehensive one than that which has been set before us, viz., a review by this Tribunal of the Decision of the Warranty Program communicated to the Applicant and it includes all the items of the present claim save two or possibly three.

We are further told by counsel for the Ontario New Home Warranty Program that the Applicant is holding back funds pending disposition of the Supreme Court action or that these are being held in escrow. It has been said that "justice delayed is justice denied." And we are mindful of that. However, in the present case, the Tribunal perceives a direct conflict of jurisdiction between that of the Supreme Court of Ontario and that of the Commercial Registration Appeal Tribunal. In such a case, we are persuaded by precedent and otherwise that we really cannot proceed until the Supreme Court has ruled. We have been referred to the leading case of Hubner vs. Direct Digital Industries Ltd. et al which is reported at p. 372 of (1975) 11 O.R. (2d) (HC) and we quote from the

headnote which reads in part as follows: "...the three indicia to be considered in an application to perpetually stay one of two actions are: 1) which action was begun first and 2) who has the chief burden of proof, and 3) which is the more comprehensive in its scope" and at page 376 of that report it was stated by the Honourable Mr. Justice Goodman that "it is trite law that a multiplicity of proceedings is to be avoided where ever possible."

We would also cite two previous decisions of this Tribunal which are of persuasive influence upon us, the first of these being our decision in the case of Carleton Condominium Corporation No. 111 which is reported at vol.13 of the CRAT Summaries of Decisions (1984) at p.201. This was a hearing which took place on the 7th May, 1984, and Mrs. Mary Jane Binks Rice stated orally, in part:

Counsel for the Program, before the introduction of any testimony on behalf of the Appellant, indicated that he was seeking a stay of proceedings. The reason for this motion is that the Appellant has issued a writ and a statement of claim in the Supreme Court of Ontario, against the builder and others, claiming negligence and breach of warranty. Counsel for the Program submits that these issues are the very issues that the Tribunal must address, although in a more narrow and limited fashion, in order to decide whether or not there are major structural defects. Counsel for the Program asserts that the High Court action which is much more comprehensive in scope, should be proceeded with and concluded prior to a hearing before the Tribunal, and that if it is not, our more summary hearing of an included issue and our decision thereon, will extremely prejudice the Program's case.

She went on to say:

We are therefore of the opinion that this appeal should be adjourned sine die pending the conclusion of the Supreme Court of Ontario action.

She also went on to say, and we think that this is relevant,

We find it most unfortunate that the Appellant's counsel and the Registrar were not put on written notice by the Program's counsel of the nature of the Program's objection to the hearing.

The other decision of this Tribunal which is persuasive for us is the decision dated November 19th, 1980 in the case of Peel Condominium Corporation No. 146 reported in vol. 9 of the CRAT Summaries of Decisions (1980) at p. 69. This decision was rendered by a panel consisting of myself, Mr. Harry L. Singer and Mr. Louis A. Rice. The part we would like to read into the record is as follows:

Notwithstanding the provisions of Section 13(6) of the New Home Warranties Plan Act, 1976, the Tribunal finds the questions and points likely to be at issue in this proposed appeal by the Applicant to this Tribunal are presently before the Supreme Court of Ontario. In short, the Tribunal finds the High Court of Justice, a branch of the Supreme Court of Ontario, is presently seized of this matter. If that action proceeds to judgment, this Tribunal will be bound by that judgment of the Supreme Court. Should the present action before the Supreme Court be abandoned however, the Tribunal will be willing to reconsider the question of its jurisdiction. In the circumstances as presently indicated, it is the decision of the Tribunal that it does not have jurisdiction in this matter and the Tribunal's order shall go accordingly.

In the present case, the Tribunal is of the identical opinion and, therefore, this hearing is also adjourned sine die pending the outcome of the Supreme Court action but before concluding, we are bound to offer Mr. Heasman, if not an apology for we cannot apologise for applying the law to the best of our ability and merely doing out duty, at least the expression of our sympathy for the exasperation and possibly frustration he must feel. Again it is unfortunate the hearing

could not have been adjourned before it was opened this morning. We wish him well and greatly hope that a speedy and just resolution to the problems with which he is evidently beset will be achieved in the future.

YORK CONDOMINIUM CORPORATION 461

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:
MARK S. HAYES, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 23 November 1987 Toronto

RULING

By Notice dated May 7th, 1987, York Condominium Corporation No. 461 ("York 461") appealed the decision of the Ontario New Home Warranty Program in which the Program refused York 461's claim for payment out of the gurantee fund established under the Ontario New Home Warranties Plan Act. It appears that the Program's position is that no notice of claim was made within the first year, and the defects do not constitute "major structural defects."

The matter was set down for hearing on September 21st, 1987, however it was adjourned on consent of both parties and a new hearing date of November 23rd, 1987, was subsequently fixed. The new date was peremptory.

Sometime later, by letter dated November 4th, 1987, the Tribunal was notified by counsel for the Program that an application would be made by way of motion for a stay of the hearing before the Tribunal in favour of the Supreme Court action which had been commenced by York 461 in 1984. Consequently, after opening the hearing on November 23rd, 1987, the Tribunal consented to hear argument on the preliminary motion and to defer hearing the merits of the appeal pending disposition of that motion.

Simply put, it is the submission of Mr. Campbell that since York 461 has commenced an action in the Supreme Court of

Ontario against the builder, George Wimpey Canada Limited, and since the claim in that action, as it relates to the underground garage is identical to that which is before this Tribunal but is more comprehensive in nature, and since the claim is for monetary compensation, the hearing before this Tribunal should be stayed or adjourned to avoid multiplicity of proceedings, inconvenience to the Program and the risk that the Supreme Court and the Tribunal may reach inconsistent conclusions with respect to the identical issues.

As an additional ground for seeking the adjournment, it was further submitted by counsel that the Program could not properly prepare to meet the case of York 461 because the Program had not received the some 54 documents listed in a letter dated November 16th, 1987 to counsel for York 461.

The application by the Program is opposed by York 461.

In support of his submission, Mr. Campbell directed the Tribunal to several decisions of the courts, as well as to a number of earlier decisions of this Tribunal in which the Tribunal, in effect, declined jurisdiction in circumstances where a claim had been made to this Tribunal under the Ontario New Home Warranties Plan Act and a similar claim was before the High Court.

Mr. Hayes, counsel for York 461, argued at some length that the Program's submissions in this matter were wrong in law and principle.

The Tribunal has carefully considered the arguments of both counsel and has read the cases cited by both before reaching its decision on this application.

While the Tribunal in an earlier decision gave considerable weight to the decision in Huebner v. Direct Digital Industries Ltd. (1975) 11 O.R. (2d) 372, that case can be readily distinguished on the facts. In Huebner, the parties in both proceedings were the same, the issues were the same, and both actions were commenced in the same court. That is not the case in this proceeding. The same situation prevailed in Rosenthal v. Fairwin Construction Co. Ltd. (1983) 32 C.P.C. 110. The McCordic decision (McCordic v. Township of Bosanquet (1974) 5 O.R. (2d) 53) can also be distinguished on the facts. The Tribunal would be very cautious in applying the decision in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1983) 33 C.P.C. 210 in light of the Court's comment at page 215 that:

...we are here dealing with a unique situation arising out of a major disaster. The technical rules...fall into insignificance in face of the obvious need for the Court to do its best to provide a workable means of dealing with the claims arising from this matter in a way that will prevent the Court from being submerged in this matter for a long period of time, to the prejudice of other litigants.

The Tuz decision (Re: Tuz and Tuz (1976) 11 O.R. (2d) 617) dealt with a situation where both parties were the same and where both actions were for custody and maintenance under the same Act. However, one action was brought in a lower court, the other, in a higher court, which is somewhat analogous to the appeal to this Tribunal and the action in the Supreme Court. Nevertheless on the basic facts, the case can be distinguished. However, the Tribunal found this decision useful in its deliberations because it emphasized that in deciding whether or not an action should be stayed, the discretion had to be exercised judicially. At page 621 Brooke J.A. said:

In my respectful view, it would be far from an exercise of the discretion of the Judge to turn away from his responsibility to hear and determine her application simply because of the proceedings pending in the other Court, or because it may put the husband to some inconvenience.

The Ontario New Home Warranties Plan Act is consumer protection legislation. It provides a limited warranty against major structural defects, and defects in workmanship and materials to a buyer of a new home. In the event that the Program denies a claim against the fund established under the Act, the buyer may appeal the decision of the Program to this Tribunal. The procedure was intended to be simple, expeditious and inexpensive. The statutory warranty does not in any way limit the right of the buyer to pursue the builder in the civil courts for breach of contract. Furthermore, there is nothing in the Act which denies the buyer his right to apply to the Program and the fund on the warranty if he takes action against the builder in the courts. The Act does not envisage an either/or situation, indeed it should not, given the limitation

on the warranty. The Tribunal is not precluded from dealing with the appeal of York 461 by the mere fact that an action has been commenced in the Supreme Court.

The next question is whether this Tribunal can and should grant a stay or adjournment.

This Tribunal, being a creature of statute, only has the specific powers granted to it by legislation. Its powers are found in several Acts. Under Section 7(2)(b) of the Ministry of Consumer and Commercial Relations Act, the Tribunal shall,

...hold such hearings and perform such other duties as are assigned to it by or under any Act or regulation.

Under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal

...shall appoint a time for and hold the hearing and...may by order direct the Registrar...

Part I of the Statutory Powers Procedure Act, being the minimum rules for proceedings applies to this Tribunal. Under Section 21 of this Act,

A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

Clearly this Tribunal has the discretion to grant an adjournment, but it must not exercise it indiscriminately.

Section 23 gives the Tribunal power to take whatever steps are proper to prevent abuse of its processes. There is no specific legislative authority to stay a proceedings.

Given the nature of the appeal before this Tribunal, the statutory obligation to hold a hearing, and the fact that the Program has known of the appeal since at least May of this year, the Tribunal is not satisfied that possible inconvenience to the Program is sufficient grounds for adjournment. It may well be that different conclusions will be reached by this

Tribunal and by the Court if the matter proceeds in both forums, but the questions to be decided are not precisely the same, nor are the parties the same. In the opinion of the Tribunal, there is no multiplicity of actions, but even if there were, that by itself is not sufficient to support an adjournment sine die and to deprive York 461 of its right to a hearing under the Act.

The Tribunal sees no prejudice to the Program if the appeal proceeds and it is satisfied that an adequate hearing will be held. To delay the hearing may prejudice the owners of the individual condominiums who are represented in this appeal by York 461. Under these circumstances the motion for an adjournment is denied. The hearing therefore will be rescheduled by the Registrar of this Tribunal after consultation with both parties.

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Summaries of Decisions
Volume 17 (1988)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 17
CITED 1988 17 C.R.A.T.

- * This volume contains in some instances full decisions and reasons given, and in others summaries only. If reference to the exact decision is desired, application should be made to the Registrar.

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BORDEAUX RESTAURANT LIMITED
(BORDEAUX RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO RENEW THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
ROBERT COWAN, Member

APPEARANCES:

MORRIS MANNING and
DAPHNE INTRATOR, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

CHRISTOPHER J. WILLIAMS, representing the
City of Scarborough

MRS. JEAN CUNNINGHAM, a party

MRS. LINDA HUURRE, a party

DATES OF 24 September 1986

HEARING: 19 February; 9, 16 April 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Bordeaux Restaurant Limited, the Licensee of Bordeaux Restaurant, from the Decision of the Liquor Licence Board of Ontario dated the 28th day of January, 1986, whereby the Board refused to renew the application of Bordeaux Restaurant Limited for a dining lounge licence.

The Liquor Licence Board issued a Notice of Proposal on the 28th day of October, 1985, to refuse to renew the dining lounge licence of the Licensee on the following grounds:

- (a) the renewal of the licence is not in the public interest having regards to the needs and wishes of the residents of the municipality in which the premises is located; and

- (b) the accommodation, equipment and facilities in respect of which the licence was issued do not fall within the class of premises eligible for a liquor licence as a restaurant because it is not engaged in the sale and service of meals to the public for consumption on the premises.

The Applicant requested a formal hearing before the Liquor Licence Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 28th day of January, 1986, resulting in the Board's Decision to refuse to renew the said licence. The Licensee appealed that Decision to this Tribunal.

At the opening of the proceedings, counsel for the Applicant advised the Tribunal that he did not appreciate that the formal hearing had actually commenced on February 19th, 1987, the date on which the hearing of the appeal had been originally scheduled, and he submitted that the hearing had not commenced until this moment. Counsel stated that he had difficulty with the composition of the panel and that he did not realize that the Chairman of this panel would be hearing this appeal. He submitted that it was inappropriate for the Chairman of this panel to sit on this appeal having regard to the fact that the Chairman had previously sat on an application involving not only the Bordeaux Restaurant, but the same parties opposing the application to renew the licence. He submitted that ordinarily there may not be a reasonable apprehension of bias in the legal sense except that his submissions to the Tribunal in this appeal will deal with the history of the way in which the Bordeaux Restaurant had been treated by the residents in the area. Counsel submitted that the selective and discriminatory legislation that had been applied to the Bordeaux Restaurant was totally illegal, unfair and abusive and that he would, therefore, be referring to the proceedings that occurred before the Tribunal in an appeal heard on March 5th, 1985. In the prior appeal which was reported in the Tribunal Summaries of Decisions, Vol. 14 (1985) page 37, the Bordeaux Restaurant had appealed from the Decision of the Liquor Licence Board refusing to remove a term and condition requiring the early closing of the restaurant, and that appeal was refused. The Chairman of the panel of the Tribunal which heard that appeal is the Chairman of the panel in today's proceedings. Counsel argued that there had been a pre-determination by the Chairman on matters dealing with the position of the Bordeaux Restaurant and asked that the Tribunal should be composed of a different panel which did not include the Chairman.

Counsel for the Liquor Licence Board and counsel for the City of Scarborough both advised that they had no objection to the panel and that in their opinion, there was no evidence of bias. Counsel for the Board submitted that his interpretation of 'bias' was where the person against whom the allegation of bias is made had made some public statement showing prejudice against an applicant. It was also pointed out that the current application is an appeal from a revocation of a licence upon its renewal and is a very different matter from the prior application by the Bordeaux Restaurant to have a term and condition removed. It was also pointed out that the date of the hearing of the appeal was originally set for February 19th, 1987 and the panel was constituted to hold the hearing on that date. A request for an adjournment was made because of the inability of counsel for the Applicant to appear; the request was considered and the adjournment was granted on a pre-emptory basis to April 9th, 1987.

The Tribunal considered the objection submitted by counsel for the Applicant and advised counsel that it was not prepared to allow his objection to the constitution of the panel and that the appeal was to proceed. It was pointed out that this is a hearing *de novo* and would be considered on the evidence which is put before the Tribunal. This panel of the Tribunal consists of three members: the Vice-Chairman and two additional members, of which two members have never dealt with any question relating to the Bordeaux Restaurant. The decision of the Tribunal is the decision of the majority of the members on the panel. It was pointed out to counsel for the Applicant that throughout the history of the Tribunal, there have been many times when there have been various re-applications with respect to the granting of the licence and they have always been dealt with by some members who might have sat on prior applications for the same applicant. It was also pointed out that regardless of the constitution of the panel, the prior decisions of the Tribunal are available to the panel in considering the decision that would be made in this application.

Counsel for the Applicant then raised the issue as to who were proper parties before the Tribunal. Counsel submitted that the Liquor Licence Board quite improperly allowed people to become parties to the proceedings and invited residents of the neighborhood to become parties in a way that was abusive and showed a bias in favour of the position of the residents. He submitted that the question of parties arises because, under Section 14(5) of the Liquor Licence Act, there is a specific provision dealing with who shall be parties before the Tribunal. Section 14(5) states:

The Board, the applicant or the holder of the licence or permit who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Counsel submitted that the Liquor Licence Board, because if it is to be made a party to deal with not only its own jurisdiction or with the concept of abusive power or process by the Board, but becomes a party with respect to the merits of the case, then its position becomes untenable. Counsel acknowledged that Section 14(5) of the Act recognizes that the Board is a party, but the question is, "What role does the Board take?" Counsel submitted that the Board acted in a biased, abusive fashion and took into account totally irrelevant matters in that it considered the question of adult entertainment, a municipal licensing matter, and the question of a rezoning application, which is also not a matter for the Liquor Licence Board. Counsel submitted that if the Liquor Licence Board is before this Tribunal as a party on both sides of the jurisdiction which it is entitled to defend by law, then it is in the unseemly position of trying to defend the fairness of its proceedings. Counsel submitted that it is wrong for the Board to participate in the merits of the case. Counsel submitted that if he can demonstrate that what happened before the Board was wrong in law and that their Decision should be quashed, it would not be necessary for the Tribunal to hear any evidence. Counsel submitted that the Liquor Licence Board is responsible to call evidence against the Licensee, then it is put in the unusual position of being able to investigate, make an appeal, hear an appeal, be wrong in law and force another hearing onto the licensee and then come before the Tribunal on the appeal, bring its own witnesses and, in effect, clean up the mistakes that were made. Counsel submitted that if the Tribunal takes that position, then the Board may be the only one able to lead evidence and that the evidence has to be relevant to the subject matter of the Liquor Licence Act. He also submitted that the City of Scarborough has no standing as a party and that counsel for the City of Scarborough could only be called as a witness.

Counsel for the Liquor Licence Board argued that an invitation is submitted to other parties to appear and that such people are added as parties so that they will have the right to appeal in the event that the Board's decision is in favour of the licensee. He submitted that the legislation gives the licensee the option under Section 14(2) to go

directly to the Tribunal if he wishes. The appeal procedure is set up in order to give an opportunity to review all evidence and that adequate protection is given to the licence holder.

Counsel for the City of Scarborough submitted that the City is already a party to the proceedings. He submitted that the Corporation has the status to cause a hearing in the first place and would have had a right of appeal to the Tribunal under Section 14(1) of the Liquor Licence Act. He submitted that the Bordeaux Restaurant was represented by counsel before the Liquor Licence Board and at that time made no objection to the City of Scarborough or the other residents being added as parties to the proceedings.

After considering the various arguments submitted to it, the Tribunal has refused to allow the objection with respect to the parties to the proceedings and confirms that the Liquor Licence Board, the City of Scarborough, Mrs. Jean Cunningham and Mrs. Linda Huurre are proper parties to the proceedings before the Tribunal. The Board was created a party under Section 14(5) of the Liquor Licence Act. The other parties were all parties to the proceedings before the Liquor Licence Board and no objection was made by counsel for the Licensee at that time. Once they were made parties before the Liquor Licence Board, they had a right of appeal under Section 14(1) of the Liquor Licence Act. Notice of the proceedings was given to them by the Tribunal and the Tribunal rules that they are proper parties to this appeal, and if not previously specified, the Tribunal hereby adds the City of Scarborough, Mrs. Jean Cunningham and Mrs. Linda Huurre as parties to these proceedings. Counsel for the Applicant was also advised that the question as to the admissibility of the evidence of those parties who have been added will be dealt with on its merits.

Counsel for the Applicant also submitted that the only issue before the Tribunal should be paragraph 7(a) of the Notice of Proposal which stated that the renewal of the licence is not in the public interest having regard to the needs and wishes of the residents of the municipality in which the premises is located, and that the Applicant should not be put in a position of defending against paragraph 7(b) of the Notice of Proposal since the Liquor Licence Board in its Decision based its refusal to renew the application for the licence because of its finding under Section 6(1)(g) of the Liquor Licence Act.

Counsel for the Applicant then submitted further

objections to the proceedings on the grounds that the statutory provision of Section 6(1)(g) of the Liquor Licence Act is invalid and void because it is vague and creates no standards. He submitted that the section does not state what a licensee must do in order to prevent a breach of the section. He further submitted that the section of the Act is not fair to either a licensee or to the Tribunal in that it does not define the word "public" or "public interest". He submitted that any law or statute must tell a citizen what he is not supposed to do. He submitted that Section 6(1)(g) does not give the benefit of "ex post facto" law making. The Decision of the Liquor Licence Board in this application indicates the dangers of the lack of specifics in the section. Counsel submitted that any vague and uncertain law is unconstitutional. He submitted that the Liquor Licence Board in its Decision has legislated to read into the statute a requirement that the licensee must be nice to his neighbours. Nobody told the licensee what he had to do when he originally invested his money and this type of legislation is unfair and is contrary to fundamental justice. The question is, "What definition of behaviour will the Tribunal apply?" Counsel submitted that Section 6(1)(a) to (f), inclusive, create definite standards. Counsel also stressed that the use of the words "needs and wishes" created additional uncertainty and vagueness which supported the contention that Section 6(1)(g) should be declared void. Counsel submitted to the Tribunal a book of authorities setting out a total of 14 cases in support of his contention with respect to the invalidity of the said section of the Liquor Licence Act.

Counsel for the Liquor Licence Board argued that Section 10(3) of the Liquor Licence Act gives to the Board the right to refuse to renew a licence on the same grounds as its right to refuse an original application for a new licence. He submitted that the Tribunal has set down in its decisions over the years, certain criteria and definitions with respect to "needs and wishes" and the general interpretation of Section 6(1)(g) of the Liquor Licence Act so as to eliminate any objection on the basis of vagueness. He submitted that sufficient guidelines have been established in prior decisions to guide licensees and applicants for licences and that these guidelines have never previously been challenged. He also submitted that the liquor legislation under the Liquor Licence Act is public welfare legislation and is in place for the protection of the public.

Counsel for the City of Scarborough concurred with the arguments submitted by counsel for the Liquor Licence Board and pointed out that the hearing before the Commercial Registration

Appeal Tribunal is a hearing *de novo* which gives it the right to consider any matter. He stated that the word "appeal" is never used in the legislation other than in Section 18 of the Liquor Licence Act which gives a right of appeal to the Divisional Court. He submitted that the use of the word "need" is a matter which allows discretion. Is the facility needed? Does the public wish it? He submitted that this is a matter which counsel for the Applicant should have taken to the Divisional Court if he was challenging the constitutionality of Section 6(1)(g) of the Liquor Licence Act. He submitted that the Tribunal had previously dealt with the question of the interpretation of "public interest" and that the Tribunal does have the right to interpret the legislation and apply its own guidelines. He submitted that the Ontario Municipal Board in its decisions have applied the same rules as to what is the "public interest" and the past decisions of the Ontario Municipal Board in this regard have been relied upon.

The Tribunal advised the hearing that it was reserving its decision with respect to the validity or invalidity of Section 6(1)(g) of the Liquor Licence Act, but that it would proceed to hear the evidence of the parties.

The first witness called by the Liquor Licence Board was Mrs. Linda Huurre who lives at 20 Bimbrok Road - six houses north of the Bordeaux Restaurant. She testified that the existence of the restaurant had affected her right of enjoyment of her residential premises and that the issuance of the liquor licence in 1978 disrupted and infringed on her lifestyle. The witness stated that, in her opinion, the area was already adequately served by other licensed premises. On cross-examination, the witness stated that she had no personal knowledge of particular incidents other than problems with respect to traffic and parking and that she had seen persons urinating on the street from time to time. She stated that she had been attempting since 1979 to have the City of Scarborough change the zoning, but that she had made no request to the City of Scarborough subsequent to 1980 since she found out that zoning amendments could not be retroactive. She stated that her concerns were zoning, adult entertainment, traffic, noise and the location of the restaurant in relation to a nearby school. The witness testified that she had approached the Metropolitan Toronto Licensing Commission with respect to the adult entertainment licence issued to the Applicant. She stated that she opposed the application for a renewal of the licence before the Liquor Licence Board because of her concern with drunkenness and drinking and driving. She stated that the adult entertainment was not a problem, but that it was the type

of patron it attracted. The witness stated that there would be no problem if the restaurant was around the corner. She stated that the peak problem time is between 4:00 p.m. and 7:00 p.m., after which time the crowds thin out.

The next witness called on behalf of the Liquor Licence Board was Mrs. Jean Cunningham who resides at 19 Bimbok Road, almost opposite. She testified that when Bordeaux Restaurant was opened, it was supposed to be a family restaurant, but that it was opened as a disco. She stated that the operation of the Bordeaux Restaurant is not in keeping with the lifestyle of the residents and referred to several incidents involving patrons of the Bordeaux Restaurant. The witness confirmed that she had lived on Bimbok Road since 1953 and, in her opinion, felt that if there was no liquor licence, the restaurant would not create a problem for the residents of the street.

Counsel for the Liquor Licence Board called two additional witnesses who were residents on the street and testified as to their objection to the licence, which objections were similar to those of the first two witnesses. One of the witnesses, Halton Webster, submitted an additional petition supplementary to the original petition filed with the Liquor Licence Board signed mainly by residents of Bimbok Road objecting to the renewal of the licence.

Counsel for the Board also called as a witness, James Wilson, who had been an Inspector with the Liquor Licence Board for 13 years and had been responsible for checking the Bordeaux Restaurant from 1981 to the present time. He confirmed that there were ten licensed establishments within a four-block area, all of which were on Eglinton Avenue, but that he had no knowledge of misconduct on the part of the Licensee and had had no problems with the establishment during his period of investigation.

The Board also called Leslie William Hebbard, an Investigator with the Liquor Licence Board, who submitted a report with respect to his investigation. The admission of the report was objected to by Mr. Manning in that it was not part of the Decision of the Liquor Licence Board, but the Tribunal overruled his objection and authorized the admission of the report as an exhibit. The witness testified that he had made three visits in September of 1985 and had prepared his report as a result of the visits. He had been directed to check the general operation of the establishment and to examine the records. He stated that, in his opinion, the establishment was

not in the business of serving food and that probably a proper ratio of liquor to food sales was on the basis of 90/10 based on his observation of sales and the amount of food in the kitchen freezer. The witness stated that, in his opinion, the establishment was not a restaurant, even though it was licensed as a dining lounge, but that there was no emphasis on the sale of food. He confirmed that he had not returned to the premises since 1985.

On cross-examination, the witness stated that he had picked only two days to record and count individual sales and that he had no knowledge of the present whereabouts of the tapes which he had checked. He stated that the dates were two Fridays: one being June 14th, 1985 and the other being August 16th, 1985. The witness stated that during his visits to the Bordeaux Restaurant, there was no objectionable noise, no garbage, no beer bottles and no drunkenness.

Counsel for the City of Scarborough submitted as evidence a certified copy of the zoning by-law for the Eglinton community area as indicated on the map which was a schedule to the zoning by-law, and confirmed that there was no violation of the zoning by-law. He stated that the restaurant is a permitted use and that although adult entertainment is not a permitted use, it was a legal nonconforming use. Counsel for the Applicant objected to the introduction of the by-law on the grounds that zoning is irrelevant, but the certified copy of By-law No. 10048 of the City of Scarborough, as amended, was admitted as an exhibit to these proceedings.

Counsel for the Applicant called two witnesses who were patrons of the Bordeaux Restaurant, one who had been a patron for nine years and who testified that there had been some problems with motorcycle groups five or six years ago, but that the manager at that time had been fired and Mr. Kochovski, the current proprietor of the Bordeaux Restaurant, took over as Manager. Both witnesses testified that they attended at the Bordeaux Restaurant several times a month and that they had not seen any of the problems referred to by the residents in their evidence.

The next witness called on behalf of the Applicant was Dimche Kochovski, the son of Cvetko Kochovski, the President and controlling shareholder of Bordeaux Restaurant Limited. Mr. Kochovski testified that he was the Manager of the restaurant and was responsible for the cooking and the booking of the entertainment. He stated that this was a family business as was another restaurant, "Mr. Coco", which was

operated by his father. The witness stated that he was responsible for the general operation of the restaurant, including the removal of garbage. He stated that most of the food came from the other restaurant and that such items as lasagne were cooked by his father at "Mr. Coco". He stated that there was some frozen food which was processed in the microwave oven. The witness stated that he was careful to ensure that there was no rowdyism and was always on the lookout for intoxicated patrons. He stated that if a patron had too much to drink, he was told to leave. The witness stated that because of the restriction on the liquor licence requiring the service of liquor to cease at 8:00 p.m., the restaurant closed at that time as it was not worthwhile to stay open after 8:00 in the evening.

The next witness called was Cvetko Kochovski, the President of Bordeaux Restaurant Limited. He stated that he had been in the restaurant business for the last 30 years and had been a chef at the Royal York Hotel and the head chef at the Toronto Club for four years. He stated that he opened "Mr. Coco" on Kingston Road in 1972 and that this was operated as a family style restaurant. The witness stated that he had no problems with the neighbours at "Mr. Coco". He confirmed that he had no partners and that this was a family run business. The witness stated that in May of 1977, he applied for a liquor licence and that the restaurant opened in September of 1977. Originally entertainment was provided by a disc jockey in the evening, but that in 1979, he brought in adult entertainment. The witness stated that he originally had two partners, but that he bought out the other partners in 1980 and hired a manager. Mr. Kochovski testified that there has been an ongoing fight with the neighbours for the past nine years, but that he has never had any complaints from the other tenants in the building in which the restaurant is located.

On cross-examination, the witness confirmed that "Mr. Coco" was a family style restaurant and that no entertainment of any kind was provided. He also testified that the customers of the Bordeaux Restaurant were mainly businessmen. He stated that he had no problems with the Metropolitan Toronto Police Department for the last five years. He also stated that the restaurant was now serving a better quality of food since it was being prepared at "Mr. Coco". The witness confirmed that adult entertainment started in February of 1979 and the hours of service of liquor were reduced in the fall of 1979.

Counsel for the Liquor Licence Board in argument submitted that the Board refused to renew the licence of the Applicant because in its opinion, the issuance of the licence

was not in the public interest having regard to the needs and wishes of the residents of the municipality in which the premises are located pursuant to the provisions of Section 6(1)(g) of the Liquor Licence Act. Counsel referred to the evidence and objections of the immediate neighbours and pointed out that this Tribunal has always given greatest weight to those people who are closer to the licensed premises. He stated that there were no objections by the neighbours when the licence was first issued in 1977, but that it was only when the restaurant began to feature bistro music and adult entertainment in the spring of 1979 that the neighbours began to complain. This complaint resulted in the terms and conditions imposed on the Licensee in the fall of 1979. Counsel referred to the definition of "restaurant" under the regulations of the Liquor Licence Act as meaning an establishment that has full kitchen facilities for the preparation of meals and is engaged in the sale and service of meals to the public for consumption on the premises and the sale of articles incidental to a meal. He argued that the service and type of food offered at the Bordeaux does not attract the type of people who are interested in ordering full-course meals. He referred to the evidence of Mr. Forbes, one of the witnesses of the Applicant, who stated that prior to 1983, the patrons had been of a particularly rowdy type. Counsel reviewed the evidence of the continuing problems up to the present time and the fact that there were new petitions taken in 1985 and 1986 indicated the strong opposition of many residents of the area. He also referred to the evidence of the liquor licence Inspector who confirmed that there was no emphasis at all in the service of full-course meals. He stated that the customers of the restaurant were apparently not from the immediate area and that they should not have any say when determining the needs and wishes pursuant to the provisions of Section 6(1)(g) of the Liquor Licence Act. Counsel stated that Mr. Kochovski is an experienced restaurant operator as demonstrated by his successful operation of "Mr. Coco" as a family restaurant, but that even he with his experience has been unable to turn the Bordeaux operation around. He submitted that the Bordeaux was not an appropriate place for a restaurant and that the application for renewal of the licence should be refused.

Counsel for the City of Scarborough submitted that, as this was a hearing de novo, the evidence of the food/liquor ratio being maintained, including the evidence of the Investigator for the Liquor Licence Board, must be considered by the Tribunal and that they were entitled to hold that the ratio was not being met. He submitted that the Bordeaux Restaurant is a place of entertainment - not a restaurant. It

was certainly not a family style restaurant because of the adult entertainment. This was borne out by the evidence of a lack of food sales if there were no drinks available. Counsel submitted that the City of Scarborough is opposed to the renewal of the licence, as were a number of residents of the area. He stated that the municipality had no quarrel with the existence of the restaurant, itself, but that the problems resulted from the adult entertainment. He stated that the location of the Bordeaux Restaurant adjacent to a single family residential zone and the evidence of the neighbours shows the impact of the restaurant on a residential neighbourhood. This nuisance had been continuing for nine to ten years. Counsel submitted that there was not sufficient evidence to overturn the Decision of the Liquor Licence Board, but that if a renewal is granted, the same terms and conditions should continue.

Counsel for the Applicant began his argument by stating that he did not know what test the Tribunal was going to apply to the law, nor did he know what evidence would be referred to. He submitted that all of the exhibits that were submitted in the proceedings before the Liquor Licence Board are inadmissible. He submitted that if the hearing before this Tribunal is a hearing *de novo*, then the only evidence that can be considered is the evidence that has been heard by the Tribunal and the documents that have gone in as exhibits in these proceedings. In dealing with the proper interpretation to be placed on Section 6(1)(g) of the Liquor Licence Act, counsel submitted that the presumption is in favour of the Applicant and the onus is on those opposing the renewal of the licence to show that the licence should not be renewed. He submitted that the evidence must be much stronger to take away a licence once it has been issued. He submitted that the licence was issued originally and has been renewed and such matters as zoning, adult entertainment, metro licensing and City of Scarborough matters are not relevant to the question of whether or not the licence should be further renewed. He further submitted that there was no evidence before the Tribunal of any abuse of the adult entertainment licence and that, in effect, there has been no evidence from the City of Scarborough as to its position in this matter.

Counsel, in dealing with the evidence of the residents, stated that they were attempting to rectify the zoning problem, obtain a revocation of the adult entertainment licence, had made objections with respect to traffic and parking, but no action had been taken by Scarborough with respect to parking and traffic and no action had been taken by the Metropolitan Toronto Licensing Commission with respect to

the adult entertainment licence. Counsel submitted that the property is zoned for a restaurant under the existing zoning by-laws of the municipality and that if it was a mistake to zone the property in this manner, why should Mr. Kochovski be penalized for the mistake of the municipality. Counsel submitted that there is no requirement under the Act for the Applicant to operate a family type of restaurant. He reviewed the letter of May 21st, 1986, from the Bimbok Road residents which was the letter of objection to the Liquor Licence Board. This letter included objections to the location, parking, the existence of the junior public school, vulgar patrons of the restaurant and the fact that there were many other licensed premises in the area, eliminated the need for the Bordeaux licence to be renewed. Counsel submitted that the concern of at least some of the residents was not that there was a liquor licence, but that there was an adult entertainment licence. Counsel submitted that every drunk on the street or every tire squealed by fast traffic is blamed on the Bordeaux Restaurant and yet there was no evidence of any problems with the police over the past five years and no evidence of the need for increased traffic control in the area. Counsel referred to the evidence of Inspector Wilson of the Liquor Licence Board who stated that not all of the problems experienced by the residents are necessarily caused by the patrons of the Bordeaux. He also referred to Mr. Wilson's evidence that he never noticed any of the matters which the witnesses were complaining about, such as noise and garbage, and never encountered any serious problems with the establishment. Counsel stated that the food/liquor ratio was not a matter which was an issue in these proceedings. The Tribunal does have the evidence of Mr. Kochovski that the sale of food has tripled. He also pointed out that the question of the food/liquor ratio was not a matter which should be dealt with by the Tribunal since it was not an issue in the Notice of Proposal. Counsel did, in fact, refer to the evidence of Investigator Hebbard of the Liquor Licence Board who did not comment upon loud noise, garbage or drunken patrons. He submitted that the power to licence and regulate businesses does not include the power to regulate morality and entertainment. He submitted that there was no proof that the Applicant had not complied with the Liquor Licence Act and that the Board had erred in taking into account irrelevant considerations in dealing with a restricted view of what a municipality is.

Counsel proceeded to make submissions that Section 6(1)(g) of the Liquor Licence Act was void for vagueness. He submitted that the Liquor Licence Board was asking this Tribunal to be the legislator by including such matters as

zoning, parking and traffic in determining whether a liquor licence should be renewed. He submitted that the Tribunal must restrict its powers specifically to the scope of the Liquor Licence Act. He referred to the case of Brampton Jersey Enterprises Limited vs. The Milk Control Board of Ontario (1956) O.R. p.1, where the Ontario Court of Appeal ruled that there is no power in the Milk Control Board to refuse a licence to a milk distributor on the ground that the district in question is already adequately served and such a ground is not related to the object or purpose of the statute. The powers given to the Board are all of a regulatory nature and this amounts to prohibition and to the exercise of a regulatory power in such a way as to give a monopoly. The decision goes on to say that if the Board refuses a licence on such a ground, it acts in excess of the powers conferred upon it by the statute and the Court should exercise its power of control by mandamus. He also referred to the case of City of Prince George vs. Payne (1977) 75 D.L.R. (3d), p.1, where the Supreme Court of Canada stated that the granting or renewal of a licence may not be unreasonably refused. This power must be exercised having regard to the context in which it appears, i.e., upon licensing considerations. The Supreme Court of Canada says it is improper for a licensing body to consider zoning and land use problems. Counsel also referred to the case of Wilcox vs. Township of Pickering (1961) O.R., p.739, where the Supreme Court of Ontario held that a licensing by-law cannot be used for the purpose of restricting land use pending the passing of a restrictive by-law. Counsel referred to the case of re Cities Service Oil Co. Ltd. and City of Kingston (1956) 5 D.L.R. (2d), p.126, which supported the same contention.

In summary, counsel for the Applicant submitted that there was no proof of noncompliance with the provisions of the Liquor Licence Act and that the Liquor Licence Board had erred in taking into account the irrelevant considerations. He submitted that the Board had only considered the local community and not the municipality as a whole and that the proceedings over the last nine years had been an outrageous and unfair effort by the immediate residents and the City of Scarborough to repair a zoning defect. Counsel submitted that because of the application of Section 24 of the Charter, the Applicant should be entitled to costs of this application on a solicitor and client basis and that under the circumstances, the awarding of costs against both the City of Scarborough and the Liquor Licence Board would be an appropriate and just remedy in the circumstances.

In reply, counsel for the Liquor Licence Board referred the Tribunal to the Tribunal's decision in Leaside Restaurant (1976) L.L.A.T., Vol. 1, p.1, and stated that greater weight must be given to persons who live in the immediate area of the licensed premises and that it is a decision for the Tribunal to determine which evidence is the most relevant in determining the application of Section 6(1)(g).

The Tribunal wishes firstly to deal with the submission of counsel for the Applicant that Section 6(1)(g) of the Liquor Licence Act is void for vagueness and accordingly should not be applied in this case. Counsel submitted that the section is contrary to Sections 7 and 15 of the Charter. Section 7 includes the liberty to carry on a business or trade and that any interference with such liberty, such as the imposition of licensing requirements, will only be lawful if imposed in accordance with the principles of fundamental justice and that this prohibits the Liquor Licence Board in considering any matters other than those which strictly relate to the regulation of the sale of liquor. The Tribunal does not accept the proposition that Section 6(1)(g) of the Liquor Licence Act is void for vagueness and, therefore, should not be applied. The position of the Liquor Licence Board is unique. It must attempt to balance the rights of the Licensee with the rights of the public at large and the Board is entitled to consider all of the evidence which relates to these conflicting rights. Counsel does agree with the submissions of the Applicant in that when giving consideration to Section 6(1)(g), no consideration should be given to the various extraneous matters such as zoning, parking, traffic and the adult entertainment licence. The licensed premises are properly zoned and the Licensee is legally licensed by the Metropolitan Toronto Licensing Commission to provide adult entertainment, which adult entertainment, although not permitted by by-law, is a legal nonconforming use. Such matters as parking and traffic are a municipal responsibility. However, the Tribunal takes the position that the rules with respect to the interpretation of Section 6(1)(g) have been established in many prior decisions of the Tribunal and that these decisions have become entrenched and establish the rules to be followed by a licensee or applicant. It is the responsibility of the Tribunal to hear the evidence by way of a hearing de novo and the evidence and exhibits that will be considered are that evidence and those exhibits which are are tendered before the Tribunal. The Tribunal has the responsibility of hearing the evidence relating to the application of Section 6(1)(g) and makings its decision on that basis.

There has been some evidence before the Tribunal with respect to the question of compliance with the food/liquor ratio, but the Notice of Proposal only referred to two grounds for refusing to renew; firstly, the needs and wishes section and secondly, that the accommodation, equipment and facilities do not fall within the class of premises eligible for a liquor licence as a restaurant. The question of the food/liquor ratio is not a matter for consideration by this Tribunal.

In dealing with the question as to the adequacy of the accommodation, equipment and facilities, there is no evidence to suggest that they are inadequate in any way. There was some evidence that the types of meals served indicated that the Licensee was not operating a restaurant, but this in no way related to the accommodation, equipment or facilities.

The matter to be considered by the Tribunal is the application of Section 6(1)(g) of the Act as it relates to the rights of the Licensee to a renewal of its licence. The Tribunal agrees that the evidence of the residents living in the immediate area is entitled to more weight than the evidence of residents in outlying parts of the municipality but, at the same time, proper weight must be given to the evidence of patrons of the licensed premises who may not reside in the immediate area, but who use the premises for business or recreational purposes. Substantial petitions have been filed by both the residents and by the Licensee. Four residents have appeared as witnesses opposing the renewal of the licence and two patrons of the Licensee have appeared in support of the renewal of the licence. However, the Tribunal finds that there is not a preponderance of evidence sufficient to support the contention that the renewal of the licence is not in the public interest and that the evidence represents the needs and wishes of the public in the municipality. The Board in its Decision appeared to rely heavily on the deficiencies of the relationship between the Licensee and the immediate neighbours and such matters as a lack of supervision of the premises which in no way relates to Section 6(1)(g). Section 6 of the Liquor Licence Act states that an applicant for a licence is entitled to be issued a licence unless it fails to comply with the seven subparagraphs of Section 6(1). The same applies with respect to an application for the renewal of a licence. Therefore, the onus is on the Board or any other persons opposing the issuance or renewal of a licence to show why such licence should not be issued or renewed. It has been argued that there is a greater onus on the Liquor Licence Board or parties attacking the renewal of a licence with respect to such renewal because of the very serious effect the refusal to renew has on an existing

licensee. In most cases, the licensee has a very substantial financial investment which would be dramatically affected by the loss of a licence.

After reviewing the evidence and listening to the submissions made on behalf of the various parties, the Tribunal finds that there is not sufficient evidence to justify the refusal of the Liquor Licence Board to renew the said licence. It is the same parties who over the last eight years who have opposed the very existence of the licence, and no new evidence has been tendered which would justify the Tribunal in confirming the Decision of the Liquor Licence Board. In fact, there is evidence to confirm that there has been some improvement in the effect of the licensed premises on the neighbouring residential properties. The objections of the residents have centred around an objection to the entertainment licence rather than the liquor licence and it would appear that this is the basis of the Board's Decision.

By virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 28th day of January, 1986, and authorizes the Board to renew the dining lounge licence of the Applicant, but such licence as renewed, shall be subject to the same terms and conditions as were previously imposed by the Liquor Licence Board.

JOAO (JOHN) BOTELHO
(LAURINDA'S TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO RENEW THE DINING LOUNGE LICENCE

TRIBUNAL: MATTHEW SHEARD, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

JEAN M.P. GHALIOUNGUI, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 8 December 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant Joao (John) Botelho, Licensee of Laurinda's Restaurant of Bradford, Ontario has appealed a ruling of the Liquor Licence Board of Ontario not to renew the latter's liquor licence set out in a Notice to Refuse to Renew dated June 5th, 1987. Such ruling and the reasons therefor were released in August 1987.

During today's hearing the Tribunal has heard testimony at length from the Liquor Licence Board Investigator, Ms. de Berner, as well as from Ms. Cain who now acts as a bookkeeper for the Applicant. Mr. John Botelho Jr., who acts as a manager for this family restaurant business also gave evidence.

The Tribunal has been made aware of previous failures to comply with the letter and spirit of the Liquor Licence Act by the Applicant since its initial licence was granted in 1982.

There have been two previous instances in which suspensions were invoked for various breaches of the Act, in 1984 and again in 1985.

The Liquor Licence Board had in contemplation other failures to comply with the Act in other non-related instances in 1985 and 1986.

In the opinion of the Tribunal a licence to sell alcohol is a privilege and a serious matter which is given in faith by the Province to a licensee through the agency of the Liquor Licence Board of Ontario.

It is the responsibility and, indeed, the duty of a licensee to uphold the Act in letter as well as spirit.

In this regard, the Tribunal feels compelled to look at the history of a particular licensee during the term of this licence. In this case, the evidence disclosed repeated failure to comply with the Act, time and time again, despite repeated opportunities given by the Board on several occasions. While the Tribunal is satisfied that the present set of books being kept by the establishment are in better order and represent an improvement upon the crude chalk notations of past years, the proprietors have not demonstrated at previous Board meetings or seminars a ready willingness to comply with the Act except on a minimal "need to know basis" by which we mean more specifically compliance pro tem during active surveillance with no serious intent either to comprehend the law or to obey it in spirit or to the letter. Indeed we perceive in their demeanour a thinly veiled contempt.

The Tribunal has felt no great need in view of the other damning evidence to dwell at length upon the obvious inability of the establishment to meet the 60/40 food alcohol ratios and we dismiss counsel's argument that we are dealing with essentially an accounting problem.

It is the Tribunal's view that this is in many ways an attitudinal problem. It is the opinion of the Tribunal that the Liquor Licence Board has in its past dealings and through the work of its field investigators laboriously bent over backwards to assist in giving guidance to this establishment. The Board in previous rulings has given ample notice to the Applicant that its house was far from in order. The onus has been on the Licensee to comply with the various points of compliance with the Act which have hereinbefore been brought to its attention over and over again. All this does not seem to have had any effect at all except that now and for the past several months some semblance of accurate record keeping has been demonstrated. But other delinquencies continued chronically and unreformed.

This is an appeal from a previous ruling. Information germane but subsequent to the date of the ruling would have been helpful but not binding on the Tribunal.

In conclusion, having regard to the evidence before it and having assessed the testimony and demeanour of the parties and all witnesses and upon its earnest assessment of the fact situation underlying this case, the Tribunal by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the Decision of the Liquor Licence Board not to renew the dining lounge licence for the premises known as Laurinda's Restaurant.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Licensee. The appeal had not been concluded at the time of this publication.

CANADA TAVERN INC.
(CANADA TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE AND LOUNGE LICENCES

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
ROBERT COWAN, Member

APPEARANCES:

PATRICK J. DUCHARME, representing the Applicant

ANNA McINTYRE, representing the Liquor Licence Board

DATES OF

HEARING: 14 June 1988

Windsor

REASONS FOR DECISION AND ORDER

In this matter the Liquor Licence Board (the "Board") ordered a seven day suspension of the dining lounge and lounge licences held by Canada Tavern Inc. for the premises known as the Canada Tavern in Windsor, Ontario. The Licensee requested this hearing to review the said Order pursuant to Section 14(2) of the Liquor Licence Act (the "Act"). Since the date of the Decision of the Board, the Licensee has applied for and has been granted an entertainment lounge licence with regard to that part of the premises formerly licensed as a dining lounge.

The Licensee admitted in its written Statement of Facts that the establishment has not in the past met the required food/liquor ratios applicable to a dining lounge licence (namely that 40% of receipts be from the sale of food). Since the Licensee has now obtained an entertainment lounge licence in lieu of the dining lounge licence, the 40% requirement no longer applies and the applicable food sales requirement is 15% of total receipts. The Board's inspector, Mr. Hebbard gave evidence corroborating that the 40% requirement had not been met in the past. He conceded, however, that the switch to the entertainment lounge licence has solved the major problem in respect of failure to meet the food/liquor ratio requirement. The evidence of the Board inspector in respect of the Licensee's failure to maintain proper books and records boiled down to a failure to accurately attribute food sales to that part of the licensed premises

where the food was consumed, i.e. lounge food sales had been attributed to the dining lounge to bolster the low food sales in the dining lounge. However, according to Mr. Hebbard's testimony, the overall totals set forth in the periodic reports submitted to the Board were apparently accurate. Mr. Hebbard testified that in May 1986, the owner openly and honestly admitted to him that he was unable to meet the food/liquor ratios for the area previously licensed as a dining lounge. The owner was advised to, and promised to apply for an entertainment lounge licence. However, the owner dragged his heels in making the application and did not have the entertainment lounge licence at the time of the hearing before the Board.

It is alleged in the Amended Notice of Proposal that the failure of the Licensee to maintain the books and records in a manner that accurately attributed food sales as between the lounge and dining lounge affords grounds for belief that the business will not be carried on in accordance with law, honesty and integrity. The Tribunal is not prepared to draw this conclusion based upon the evidence before it, particularly in view of the fact that an entertainment license has now been obtained by the Licensee. However, the Tribunal does wish to impress upon the Licensee that it has an obligation to keep accurate and separate records in respect of each of the premises covered by the separate licences and it must not in the future record food sales in the casual manner exhibited in the past, that is, without regard for the actual source of the recorded food sales.

The next witness called on behalf of the Board was Constable D. Stack. He testified that he was present at the licensed premises on July 24th, 1986 and at that time, he observed a female under the age of nineteen years seated in the dining lounge. He did not observe her consuming alcohol. The young woman was charged with the offence of "being under 19 years of age, enter a licensed premises" contrary to the Act, however, the charge was apparently laid in error since Section 51(1)(a) of the Regulations specifically allows minors to enter premises for which a dining lounge licence has been issued.

Constable Stack also testified that on a number of occasions he has laid charges against various individuals in the parking lot for consuming liquor in a place other than a residence or licensed premises. There was no evidence that the alcohol had been purchased in the Canada Tavern. Under cross-examination, the officer confirmed that other taverns in the area experience the same problem, the perpetrators, being,

by and large, young people from across the U.S. border where the legal drinking age is 21. He agreed that the Licensee has done a great deal to attempt to solve problems of minors using false identification and entering the premises. Off-duty officers have been hired to work at the Tavern to maintain order and to prevent violations of the Act. He further confirmed that most of the problems with noise and drinking in the parking lot are now under control.

Notably all of the parking lot offences referred to in the Notice of Proposal occurred in 1985 and 1986. It should also be noted that the parking lot is not technically part of the licensed premises, so that these offences cannot, in any event, be relied upon to prove the allegation that the Licensee "permitted drunkenness or riotous quarrelsome, violent or disorderly conduct to take place in the licensed premises" as alleged in the Notice of Proposal. This is not to say that the Licensee does not have an obligation to insure that such conduct does not occur in the parking lot area as such conduct will undoubtedly have a bearing on the needs and wishes of the residents in the surrounding area.

The Board's next witness was Officer G. Nichols who also laid numerous charges against individuals consuming alcohol in the parking lot. The majority of these charges were laid on November 7th and 8th, 1986 and one charge was laid February 7th, 1987. Officer Nichols stated that he has seen no incidents at all more recently in the parking lot. He testified that, in his opinion, the Licensee was not to blame and was not guilty of lassitude in supervising the parking lot. He agreed that the problem was one encountered by other taverns in Windsor as well.

The Board's next witness was Officer Robert Bulmer. He testified that on March 15th, 1986, he was off-duty and in uniform working at the Canada Tavern. At that time, he witnessed a fight between two women in the women's washroom. He and the doorman removed the individuals involved. The Officer stated that the doorman acted very effectively and efficiently. He stated that, in his opinion, the staff at Canada Tavern are very professional. Officer Bulmer has worked at the Canada Tavern intermittently since 1981. On August 22nd, 1987, he was working at the Tavern along with Officer Rundle. He observed two males in the line-up, within the premises, waiting to get into the part of the premises offering live entertainment. The individuals were 'chug-a-lugging' beer, became rowdy and caused a disturbance. They were arrested and removed from the premises within approximately

three minutes. Officer Bulmer testified that he believes that the owners are genuinely concerned with keeping intoxicated persons off the premises. He has never seen the staff serve alcohol to any intoxicated person.

Officer Rundle was also called to testify on behalf of the Board. His only evidence was that he received a complaint at the station from a woman who claimed to have been assaulted at the Tavern. He took the report but did not lay charges since he had no evidence to corroborate the woman's story. The woman was not called to testify. The Tribunal does not find this evidence of any assistance in determining the issues before it. While the rules of evidence before the Tribunal are more flexible than those applicable before a court of law, the Tribunal's discretion to rely upon hearsay evidence must be carefully exercised. Such evidence should not be relied upon where it would be clearly unfair and prejudicial to the other party who is deprived of any opportunity to cross-examine or otherwise challenge the evidence. As indicated by Mr. Ducharme, he was not advised prior to the hearing that this evidence would be called. He had no opportunity to attempt to contact the woman involved or to take other steps.

The same comments apply to the evidence of Officer Bodri who testified that he received a complaint from a female person who claimed she was assaulted by a bouncer at the Tavern who had refused entry to her and her male companion. Again, while the Tribunal accepts that the complaint was made to the officer, no finding as to the veracity of the facts complained of can be made by the Tribunal.

Officer Paul Jean was also called to testify on behalf of the Board as to a fight which occurred in the Canada Tavern on June 13th, 1987. A male person entered the premises and the doorman asked him to leave due to his improper attire. The individual in question was a notorious person with a lengthy criminal record. Two bouncers assisted the doorman in removing the individual from the premises.

With respect to those incidents occurring within the Canada Tavern which were referred to in the evidence of Officers Bulmer and Jean, the Tribunal is of the view that in all cases the staff of the Canada Tavern, including the off-duty officers involved, acted speedily and with due diligence to terminate the incidents and to remove the individuals involved from the premises. The Tribunal finds that the allegation set forth in the Notice of Proposal that the Licensee "permitted drunkenness or riotous, quarrelsome,

violent or disorderly conduct to take place in the licensed premises" contrary to Section 8(4) of Regulation 581 is not made out. In the Tribunal's opinion, the simple fact that the incidents took place notwithstanding that the Licensee had competent and efficient staff on duty who acted diligently to terminate the incidents, is not sufficient to establish the "permission" contemplated by the regulation in question. The regulation does not create a standard of "strict liability", regardless of the diligence exercised by the Licensee.

Counsel for the Board advised the Tribunal that the first ground cited in the Amended Notice of Proposal with respect to the public interest and the needs and wishes of the public was being abandoned by the Board. Accordingly the Tribunal does not have to consider that ground.

In result the Tribunal finds that the Licensee's licence should not be suspended and, therefore, by virtue of Section 14(3) of the Liquor Licence Act, the Board's Decision is revoked.

CONFEDERATED ENTERPRISES LIMITED
(KINGSWAY TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE AND LOUNGE LICENCE

TRIBUNAL: JAMES G. LESLIE, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
DENNIS J. EGAN, Member

APPEARANCES:

ARTHUR M. BARAT AND AVRIL A. FARLAM,
representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 21 March 1988

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal in its deliberations has reached certain conclusions and they are as follows.

We find that the Liquor Licence Board in its Decision was quite justified in coming to its conclusion with the evidence before it. We find also that there were infractions under Section 8 of the Regulations, particularly subsection 35 and 36, and it appears now that those infractions, although the subject in the past of scrutiny, have been remedied. We find also that the months of January, February and March 1986 in which the discrepancies arose were not months in which figures were given to the Liquor Licence Board knowingly and falsely by the Applicant but perhaps carelessly. But at the sametime, we also find that that probably could have been remedied by the production of the tapes in question and those tapes have not, to date, been given in evidence before either the Liquor Licence Board or this Tribunal.

Nevertheless, despite the Decision of the Liquor Licence Board, we also find that the situation with regard to the bookkeeping system in the hotel has changed and it would appear now clarified to the satisfaction of all concerned. We find it was largely a matter of carelessness on the part of the owner, and not an attempt to falsify any evidence before the Board. That situation having been changed gives us discretion to consider a change in the penalty as levied by the Liquor Licence Board.

One of the reasons for that is that the evidence before this Tribunal today was not entirely before the Liquor Licence Board and I refer to the Applicant's brief, Tab 9 and the months of October and November 1987 in which the items appear to be well set out and to the satisfaction of both the Board and the Applicant. Had that evidence been given to the Liquor Licence Board, had the tapes been given to the Liquor Licence Board, perhaps there would have been no necessity for this hearing. It is unfortunate that this evidence which in part was available to the Applicant at that time and the tapes which were certainly available to the Applicant at that time were not brought into evidence before the Liquor Licence Board. The result was that the Board, in our view, quite justifiably came to its conclusion and levied the penalty it has. We, however, have the benefit of this evidence and it therefore must temper our view of the Board's Decision.

We cannot agree that the fact that the Applicant has now remedied the situation should make no difference; we consider that it does make a difference and that, although he was in contravention of the Regulations in January, February and March of 1986, we do not expect under the new system of bookkeeping the matter will arise again. Under those circumstances it may be that the penalty as given by the Liquor Licence Board was too severe.

We are therefore of the view that a reprimand, a severe reprimand I might add, to the Applicant is in order, and that reprimand involves the decision that in the event the Applicant seeks to come before this Tribunal in the future on any matter involving section 8 of the Regulations, subsection 35 and 36 particularly, the reprimand given today will clearly be considered as part of any future penalty in the event the Tribunal finds adverse to his interests.

As a result, we hereby set aside the penalty of a suspension of seven days of the Liquor Licence Board and in its place, as I have said a few moments ago, give the Applicant a severe reprimand, that any future infraction of the Regulations, will be considered very seriously by this Tribunal.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 3rd day of November, 1987.

595518 ONTARIO LIMITED
(SANTE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO RENEW THE LIQUOR LICENCE
TO SUSPEND THE LIQUOR LICENCE FOR A PERIOD OF THREE DAY

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
THOMAS KROEGER, Member

APPEARANCES:

BRIAN BOURNS, its agent

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 15 July 1988

Ottawa

REASONS FOR DECISION AND ORDER

At the outset of the hearing counsel for the Liquor License Board brought a motion to add as grounds for the Order of the Liquor Licence Board dated February 25, 1988, the exception contained in Section 6(1)(d) of the Act; namely, that the past conduct of the Applicant affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty. This was objected to by Brian Bourns an officer and director of the Applicant on the basis that the Decision of the Liquor Licence Board was based entirely on the provisions of Section 6(1)(a) of the Act dealing with the financial responsibility of the Applicant and that to now add new grounds would be unfair to the Applicant.

Counsel for the Board argued that as this hearing is a hearing de novo new grounds can be presented. He referred the Tribunal to two cases reported in Volume 16 C.R.A.T.: the case of Dan Kornitzer at page 228 and the case of Saffet Mertel at page 251. In both of these cases the Registrar under the Real Estate and Business Brokers Act had cited two grounds for refusal of registration: financial responsibility and past conduct. In the present case this is not the situation. Only financial responsibility is cited. The Tribunal finds that while new evidence may be presented to the Tribunal this evidence must relate to the initial decision of the Liquor Licence Board and the grounds upon which such decision was

made. It is not the function of this Tribunal to hear for the first time a complaint against the Applicant. This is the function of the Liquor Licence Board. The Tribunal therefore disallowed the motion to add additional grounds.

The Decision of the Liquor Licence Board dated February 25, 1988 found that the Applicant had been financially irresponsible in making its payments to the Treasurer of Ontario in respect to Retail Sales Tax, but further found that the Applicant had provided post-dated cheques up to July 1988. The Board went on to say that if those cheques were honoured the Applicant could reasonably be expected to be responsible in the conduct of its business. Evidence presented to the Tribunal confirmed not only that the Applicant has honoured the cheques but that it has made all filings and paid all Retail Sales Tax to the date of the hearing before this Tribunal and on the evidence of the representative of the Retail Sales Tax Branch is in good standing.

Substantial evidence was presented to the Tribunal explaining the financial and administrative difficulties which the Applicant had in commencing the business of the Sante Restaurant and the efforts of Mr. Bourns and Ms. Holtom to overcome these vicissitudes. All of these activities in fact display evidence of strong financial responsibility, determination and integrity. Counsel for the Liquor Licence Board conceded that all three conditions referred to in the Board's Order of February 25, 1988 have been complied with.

On the basis of the overwhelming evidence in favour of the Applicant, the Tribunal must pose the question: Why are we hearing this application at all? The answer seems to be solely based on the fact that by a quirk of time the Applicant's licence came up for renewal in November 1987 at which time a request for Retail Sales Tax clearance revealed arrears of Sales Tax in the amount of \$14,875.77. This clearance was requested pursuant to the provisions of Section 8(40) of the Regulations under the Liquor Licence Act. This clause of Section 8 was revoked December 17, 1987, filed in the Ontario Gazette on December 18, 1987. Thus if the Applicant's renewal had occurred a month later no such information would even have been presented to the Board. It is evident that the sole basis for the Board's decision was the failure to make payments of Retail Sales Tax. This is not the situation before this Tribunal. The Commercial Registration Appeal Tribunal has in past decisions clearly stated it is not prepared to be a collection agent for the Retail Sales Tax Branch. Retail Sales Tax Branch has ample remedies under its statute. The

Legislature has supported this position by revoking Section 8(40) of the Regulations.

There being no evidence of financial irresponsibility, the Tribunal can find no basis in law for the Board to have renewed the Applicant's licence and then suspended it for three days.

Therefore pursuant to the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Liquor Licence Board to renew the liquor licence of the Applicant, but not to carry out its Proposal to suspend the Applicant's licence for three days.

FOURS SEASONS HOTELS LIMITED

APPEAL FROM TWO DECISIONS OF THE
LIQUOR LICENCE BOARD OF ONTARIO

REQUIRING THE PAYMENT OF
LIQUOR LICENCE TRANSFER FEES

TRIBUNAL: LACHLAN CATTANACH, Vice-Chairman, Presiding
MARY G. CRITELLI, Vice-Chairman as Member
NEIL E. VOSBURGH, Member

APPEARANCES:

EDWIN A. GOODMAN and
KENNETH W. CROFOOT, representing the Applicant

DENNIS W. BROWN, representing the
Ministry of Consumer and Commercial Relations

DATE OF

HEARING: 21 October 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by way of stated case from the Decisions of the Liquor Licence Board of Ontario dated March 24th, 1972 and February 1st, 1974, whereby the Liquor Licence Board required Four Seasons Hotels Limited to pay liquor licence transfer fees in the total sum of \$128,334.73 as a result of the amalgamation and share issuance by Four Seasons Hotels Limited necessary to arrange financing. The said sum of \$128,334.73 was paid on February 8th, 1974 under protest. The questions submitted for the determination of this Tribunal are as follows:

- (a) Did the Liquor Licence Board err in finding that the participation of the licence-holding companies in the amalgamation involved the issue or transfer of any shares of the capital stock of the licence-holding companies to the amalgamation corporation, within the meaning of Sections 45 and 46 of the Liquor Licence Act, R.S.O. 1960, Chapter 218, as amended (the 'Act' or the 'Liquor Licence Act')?

- (b) If the Liquor Licence Board was correct in its findings as set out in paragraph (a), then did the Board err in computing the number of transfers which took place for the purposes of applying Section 57 of Ontario Regulation 187/65?
- (c) Did the Liquor Licence Board err in finding that a substantial interest had been issued upon the issuance of 250,000 shares and 100,000 share purchase warrants to the general public in February, 1969, within the meaning of Section 46 of the Act?
- (d) Did the Liquor Licence Board err in including the 100,000 share purchase warrants exercisable to 1979, in its assessment of the number of shares issued?

Four Seasons Hotels Limited ("Four Seasons") is a corporation continued under the laws of the Province of Ontario pursuant to articles of amalgamation dated the 31st day of December, 1968, confirming an amalgamation agreement between Four Seasons Motor Hotel Limited and 22 other corporations, all of which were incorporated pursuant to the laws of the Province of Ontario. Prior to the amalgamation Four Seasons Motor Hotels Limited which operates the Four Seasons Motor Hotel was owned by Max Sharp, his daughter Edith Creed and Murray B. Koffler. The second hotel involved in the amalgamation, the Inn on the Park, was owned by six corporations in partnership which were owned as follows:

The Four Seasons Inn on the Park Limited	-	Lena Sharp, wife of Max Sharp
Fredos Limited	-	Frederick Eisen and Rosalie Sharp, son-in-law and daughter-in-law respectively of Max Sharp.
Marmond Limited	-	Marvelle Koffler, wife of Murray B. Koffler, and Edmond M. Creed, son-in-law of Max Sharp.
Koreed Limited	-	Edmond M. Creed, Edith Creed, Murray B. Koffler and Marvelle Koffler.

- | | | |
|-----------------------|---|--|
| Mured Hotels Limited | - | Murray B. Koffler and Edmond M. Creed. |
| Edimar Hotels Limited | - | Edith Creed and Marvelle Koffler. |

The remaining companies involved in the amalgamation owned the lands and buildings of these hotels. Prior to the amalgamation the Inn on the Park and Four Seasons Motor Hotel Limited were licensed by the Liquor Licence Board pursuant to the provisions of the Liquor Licence Act to provide for the sale and consumption of liquor, beer and wine in their respective premises.

The Inn on the Park and Four Seasons Motor Hotel Limited became a contender in the competition for the development of the Sheraton Hotel on the south side of Queen Street in the City of Toronto. In order to be in a financial position to be considered in the competition, it was necessary for the principals to increase the net worth of the operating companies by transferring the land and buildings owned by the various holding companies to the operating companies to provide a sufficient asset base and the amalgamation resulted. The principals were also told that any debenture issue would require a "sweetener" in the form of shares and warrants for shares.

On the amalgamation all the issued and outstanding shares of the predecessor corporations, with the exception of one corporation, the shares of which were cancelled, were converted into shares of the continuing corporation Four Seasons Hotels Limited based upon an independent appraisal of the respective assets and audited financial statements for each of the companies. Following the amalgamation, there were 1,000,000 shares of Four Seasons issued, all held by the shareholders of the predecessor corporations.

In February of 1969 Four Seasons issued to the public, pursuant to a prospectus, units of securities, each consisting of:

- (a) A \$1,000 7% sinking fund debenture with warrants entitling the owner to purchase equity shares in the corporation for the price of \$10.00 per share up to February 3, 1976 and \$12.00 per share from February 4, 1976 to February 3, 1979. The warrants

permitted the purchase of 20 shares for each \$1,000 of debenture.

- (b) 50 shares of the capital stock of the company.

(a) and (b) as a unit were sold for the price of \$1,200.00 per unit. 5,000 of such units were sold for an aggregate total of \$6,000,000 and all of the proceeds of the sale, after deducting underwriting, discount, legal and other expenses of the issue, accrued to the treasury of Four Seasons. The total number of shares issued to the public as part of the 5,000 units sold amounted to 250,000, which shares represented 20 per cent of the total issued and outstanding shares following the public issue. The total number of shares which could have been purchased pursuant to the warrants, at the rate of 20 shares per warrant, amounted to 100,000 shares. By the terms of the warrants, the exercise of the right to purchase the shares thereunder were not exercisable until February 3, 1972 or three years after the public issue. The new issued shares were purchased by approximately 900 shareholders. It was believed that no new shareholder held more than one to two per cent of the stock of the company, and following the public issue, no director was elected to specifically represent the new shareholders and there was no change in the management or operation of Four Seasons Hotels Limited. It was further agreed that none of the purchasers to whom shares were sold acquired any specific voice in the management or operation of Four Seasons.

As a result of the amalgamation, it was necessary to make an application for the transfer of the liquor licences involved from Inn on the Park and Four Seasons Motor Hotel to Four Seasons Hotels Limited and the Liquor Licence Board assessed the following transfer fees:

- (a) Under the amalgamation

Inn on the Park -	25 minimum fees @ \$100.00	\$2,500.00
Four Seasons -	14 minimum fees @ \$100.00	\$1,400.00

- (b) Upon the debenture, share warrants and share issue

Inn on the Park -	25.9%	\$118,707.48
Four Seasons -	25.9%	\$5,727.25
		<u>\$128,334.73</u>

Section 45 of the Liquor Licence Act, R.S.O. 1960, as amended, stated:

- (1) No licence shall be transferred except with the consent in writing of the Board and the Board is not under any circumstances bound to give such consent.
- (2) Upon a transfer of a licence, the transferor shall pay to the Liquor Control Board of Ontario at the time of the transfer such fee as the regulations prescribe.

Section 46 of the Liquor Licence Act, R.S.O. 1960, as amended, states:

- (1) The Board may require the directors of an incorporated company that is the holder of a licence to present to the Board for approval any issue or transfer of shares of its capital stock, and where in the opinion of the Board a substantial interest is issued or transferred, subsection (2) of Section 45 applies mutatis mutandis.

The Applicant objected to the said tax in the amount of \$128,334.73 being assessed resulting in this appeal by way of the stated case.

Counsel for the Applicant submitted, firstly, that this amalgamation in the circumstances does not result in the transfer of a licence. He submitted that the purpose of Section 45 of the Liquor Licence Act is to deal exclusively with the transfer of a licence. Section 96 of the Corporations Act, R.S.O., 1960, Chapter 71 (the 'Corporations Act') states, in part, as follows:

- (1) Any two or more companies, including a holding and subsidiary company, having the same or similar objects may amalgamate and continue as one company.

- (2) The companies proposing to amalgamate may enter into an agreement for the amalgamation prescribing the terms and conditions of the amalgamation...the manner of converting the authorized capital of each of the companies into that of the amalgamated company.
- (4) If the amalgamation is adopted in accordance with section 3, the amalgamating companies may apply jointly to the Lieutenant Governor for letters patent confirming the agreement and amalgamating the companies so applying, and on and from the date of the letters patent such companies are amalgamated and are continued as one company by the name in the letters patent provided, and the amalgamated company possesses all the property, rights, privileges and franchises is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating companies.

Counsel argued that the use of the word "continue" in subsection (1) and "continued" in subsection (4) support the contention that the predecessor companies are continued as one company. He referred to the case of re: Stanward Corporation v. Denison Mines Ltd. (1966) 2 O.R., p.585, to support this position and submitted that it was clearly the intention of the legislature and the effect of the legislation, that the continuation of the assets in the continuing corporation should not constitute a transfer of assets. In this case, the Court of Appeal held that where one company was subject to royalties and was amalgamated with another company, the amalgamation was not an acquisition of the claims. Counsel argued that the conversion of the authorized capital of the companies forming the amalgamation into that of the amalgamating company is not a transfer or issuance of shares so as to create a liability under Section 45 of the Act.

The next major issue raised by counsel for the Applicant dealt with the question of the issuance of shares and warrants by Four Seasons to raise financing. In order for transfer tax to be payable, the Liquor Licence Board had to

determine that the issuance was of a "substantial interest" within the meaning and purpose of Section 46. Counsel for Four Seasons argued that the issuance cannot be considered to involve a "substantial interest" within the meaning and purpose of Section 46. He argued that the purpose of Section 46 of the Liquor Licence Act was to prevent trafficking in licences and, further, to control licensees to prevent licences from falling into the hands of persons to whom the Board would not in the first instance issue licences. Since the sole purpose of the public issue in this case was to borrow funds for the expansion of the company's business and since the entire proceeds of the sale accrued to the benefit of the treasury, there is no justifiable rationale for finding the issuance to be a "substantial interest" within the meaning of Section 46 since it did not involve a change in control and was not trafficking in a licence. Counsel also argued that with respect to the issuance of warrants, the warrants were not exercisable until 1972 and at certain times thereafter and might never have been exercised and that they, therefore, did not constitute an issuance of shares. Counsel submitted that it was necessary for the various companies to amalgamate and the amalgamated company to go public in order to raise funds to expand its operations. There had been no change in the management or control and no change in the board of directors and there was, therefore, no issuance or transfer of a "substantial interest" within the meaning of Section 46 of the Act.

Counsel for the Respondent submitted on a preliminary basis that the scope of this review must be limited to the law as it existed at that time and that the Tribunal is not entitled to look at the state of the law as it exists today.

Counsel referred to Section 20 of the Liquor Licence Act which states that "the decisions, orders and rulings of the Board are final and shall not be questioned, reviewed or restrained by injunction, prohibition, mandamus...but the Board, may, or at the request of any person having a proprietary interest in the matter before the Board shall, state a case on a point of law only as provided from time to time in the Criminal Code (Canada)." He, therefore, submitted that the Board is only subject to review should this Tribunal find that the Board rendered an interpretation of Sections 45 and 46 of the Act that may be characterized as "patently unreasonable". Counsel submitted that the Tribunal must only consider questions of law and that this was not a "hearing de novo".

Counsel for the Respondent submitted that this

transfer was a de facto transfer of licence within the meaning of Section 45(1) and (2) of the Liquor Licence Act. Prior to the amalgamation, a liquor licence had been issued to Four Seasons Inn on the Park Hotels Limited and Four Seasons Motor Hotels Limited and that on the amalgamation, the licences were transferred to Four Seasons. Counsel submitted that there is nothing in the Act to suggest either implicitly or explicitly that a transfer shall not be deemed to occur when the named licensee ceases to exist on the basis by which the said licence was originally issued and through amalgamation becomes a new company. He, therefore, submitted, that the minimum transfer fees in the amount of \$3,900.00 were due and payable and that there was no dispute as to the number of transfers.

Counsel for the Respondent proceeded to make submissions with respect to the question as to whether there had been a transfer of a "substantial interest" in the company pursuant to the provisions of Section 46 of the Act. He submitted that it is in the discretion of the Liquor Licence Board whether a "substantial interest" has been issued or transferred. He submitted that the issue or transfer of shares which took place consisted of 5,000 units with each unit consisting of a \$1,000.00 debenture which carried warrants or rights to purchase 20 shares and 50 common shares. This issue or transfer created a potential increase in share capital in the amount of 350,000 shares. Counsel submitted that the Tribunal must look at the interest being relinquished, not the individual numbers, and what has happened is a potential decrease in the ownership of the shares by the original owners from 100 per cent to 74.1, or a potential total decrease of 25.9 per cent of the shares held in the company. He submitted that the Board when considering an application must look at the issue as a whole and that the Board is not required to investigate where the shares are going.

Counsel for the Respondent submitted that the Board has an absolute discretion as to what constitutes a "substantial interest". There is nothing in the Act which assists in defining what is meant by "substantial". He submitted, however, that the legislature had left it to the Board to determine what is in the best interests of the industry and thereby raise its own standard as to what it felt would be substantial having regard to the particular facts in question. He submitted that the Tribunal must consider the nature of any error which the Board might have made with respect to the interpretation of the words "substantial interest" and the Tribunal must find not only that the interpretation of Sections 45 and 46 are wrong, but are wrong

to the extent that they are patently unreasonable. He submitted that unless an error is patently unreasonable, there is no right to interfere and that simple disagreement with the interpretation of the section is not, in itself, sufficient to justify interference with the Decision of the Liquor Licence Board. Counsel referred to the Decision of re: Ontario Public Service Employees Union and Forer, et al 52 O.R. (2d) p.705, where the question before the Court was whether the interpretation by the Ontario Public Service Labour Relations Tribunal was patently unreasonable and whether the clause in question was a privative clause which protects the Tribunal's decision from judicial review. The section under review was Section 39 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, Chapter 108, which read as follows:

The Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, and, except as otherwise provided in this Act, the action or decision of the Tribunal thereon is final and binding for all purposes, but nevertheless the Tribunal may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The question is whether the section is a privative clause which protects the Tribunal's decision from judicial review and, in this case, the Ontario Court of Appeal concluded that Section 39 should be given privative effect. The consequence of that finding is that the appropriate standard of review to be applied to the Tribunal interpreting of the words...is whether the Tribunal's interpretation is or is not patently unreasonable.

Counsel for the Respondent also took the position with respect to the warrants attached to the debentures that if there was no exercise of the warrants within the time limit, the licensee might be entitled to some rebate, that that in the meantime, the full amount of the tax should be payable.

In reply, counsel for the Applicant first dealt with the question of the "amalgamation versus transfer". He submitted that Section 96(4) of the Corporations Act

specifically referred to companies as being continued after amalgamation and the amalgamated company possesses the "franchise". In reply to the application of Section 20 of the Liquor Licence Act, counsel submitted that this Tribunal under Section 14(3) of the Liquor Licence Act, R.S.O. 1980 has the right to substitute its decision for the decision of the Board. Counsel also distinguished the case of re: Ontario Public Service Employees Union and Forer from Section 20 of the Liquor Licence Act in that if Section 20 is being applied, there is no attempt to overrule by certiorari but, rather, the proceeding is by way of a stated case and the same jurisdiction would apply as if it was being dealt with under Section 14(3) of the current Act.

With respect to the interpretation of "substantial interest", counsel for the Applicant submitted that the legislature had in mind the question of control and operation and no less, and that the Tribunal is entitled to look at the facts and draw its own conclusion.

The Tribunal takes the position with respect to the application of Section 20 of the Liquor Licence Act, R.S.O. 1960 and Section 14(3) of the current Act, that the Tribunal has before it a stated case on a point of law and may substitute its opinion for that of the Board. The Tribunal, therefore, finds as follows with respect to the questions submitted to it by way of stated case:

- (a) The Tribunal finds that the participation of the licence-holding companies in the amalgamation did not involve the issue or transfer of any shares of the capital stock of the licence-holding companies to the amalgamation corporation within the meaning of Sections 45 and 46 of the Liquor Licence Act. The Tribunal is satisfied that Section 96 of the Corporations Act provides that the predecessor companies are continued as one company and the amalgamated company possesses all the property, rights, privileges and franchises of each of the amalgamating companies, including any licences. The amalgamation was necessitated by the requirements for additional capital and there was no change in the management and control with respect to the said licences. The Tribunal accepts the contention that it was clearly the intention of the legislature and the effect of the legislation that the continuation of the assets in the amalgamated corporation should not constitute a transfer of assets under the

circumstances and the Tribunal relies on the decision of Stanward Corporation v. Denison Mines Ltd. (supra) in support of this position.

(b) This is not applicable.

(c) The answer to this question is based on an interpretation of the words "substantial interest". This was an issue under Section 46 of the Act and the Board required the licensee to present to the Board for its approval any issue or transfer of shares in the capital stock of the licensee. The Tribunal is not entitled to look at the 1975 amendment to the Liquor Licence Act, but must consider the legislation as it existed at the time of the issuance. The Tribunal must consider whether it can interfere with the absolute discretion of the Board as provided by Section 46 of the Act and, in this connection, the Tribunal looks at Section 14(3) of the current Act which gives the Tribunal the right to substitute its opinion for that of the Board. The Liquor Licence Act is a regulatory statute and must be interpreted strictly, but the Tribunal has the authority within such scope to make a decision based on the facts before it. The Respondent, by submitting to our jurisdiction to rule on a stated case, acknowledges that the discretion of the Liquor Licence Board is not absolute. The Tribunal accepts the Applicant's submission that the purpose of Section 46 is to regulate trafficking in licences. Counsel for the Respondent referred to the discretion of the Board to approve but, once approved, the declaration by the Board that there is a "substantial interest" is for taxation purposes only. Section 46 of the Act provides that where there is the issuance of a "substantial interest" then one must refer back to Section 45(2) which infers a transfer of control. In this matter, there has been no transfer of control and no transfer of licence and the Tribunal finds that there has been no issuance of a "substantial interest" within the meaning of Section 46 of the Liquor Licence Act.

(d) The Tribunal finds that if there had, in fact, been a transfer of a "substantial interest" under Section 46 of the Act, there should have been no transfer tax payable on the warrants and the Applicant would have been entitled to a rebate of the transfer tax charged on the said warrants.

The question of whether the Applicant is entitled to interest in the event that it is entitled to a rebate of the transfer tax was raised and argued by counsel for both the Applicant and the Respondent. However, the question of interest was not included in the framework of the stated case and the Tribunal takes the position that it does not have the authority to deal with the question of interest within the provisions of Section 14(3) of the current Liquor Licence Act. Such decision shall be without prejudice to the right of the Applicant to pursue the question of interest to any court of competent jurisdiction.

By virtue of the authority vested in it under Section 14(3) of the current Liquor Licence Act, the Tribunal hereby finds that the participation of the licence-holding companies in the amalgamation did not involve the issue or transfer of any shares of the capital stock of the licence-holding companies to the amalgamation corporation within the meaning of Sections 45 and 46 of the Liquor Licence Act and that a "substantial interest" had not been issued or transferred upon the issuance of 250,000 shares and 100,000 share purchase warrants within the meaning of Section 46 of the Act, and the Tribunal directs the Board to rebate to the Applicant the sum of \$128,334.73 being the amount of transfer fees assessed by the Liquor Licence Board. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Ministry of the Attorney General on behalf of the Liquor Licence Board. The appeal had not been concluded at the time of this publication.

BRENDAN McCONNELL ENTERPRISES LIMITED
(COCAMO TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A PATIO LICENCE

TRIBUNAL: MATTHEW SHEARD, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
WILLIAM JOE, Member

APPEARANCES:

C.E.J. ECCLESTONE, representing the Applicant

ANNA McINTYRE, representing the Liquor Licence Board

J.T. BARKER, a party

DONALD LAMARRE, a party

DOUGLAS M. SLACK, a party

J. MacPHERSON, a party

MS. ROSS, representing Ms. WILSON, a party

DATES OF 10, 11 March 1988 and
HEARING: 3, 4 May 1988

Kingston

REASONS FOR DECISION AND ORDER

This is an appeal from a Decision of the Liquor Licence Board dated October 23rd, 1987, which said Decision dealt with a Notice of Proposal of the said Board to refuse to issue a patio licence in respect of the premises known as the Cocamo Tavern, Kingston and which said Decision did vary the said Proposal to the extent that it ordered the licence be granted subject to a term and condition that the sale and service of alcohol cease at 10:00 p.m. daily.

Highlights of the Board's succinct four-page decision read as follows:

The Cocamo Tavern is a large establishment located at 178 Ontario Street, in the City of Kingston. It has a total capacity of six hundred (600)

persons -- two hundred and thirty-four (234) in the Dining Lounge and three hundred and sixty-six (366) in the Lounge. (The capacity has recently been reduced by approximately fifty (50) persons). There is a Patio (Lounge) Licence issued for the rear of the building; however, apart from two months in 1984, the Patio has not been operated. The present application is for a 'Patio' Licence on the sidewalk directly in front of the building. The 'Patio' would accommodate sixty-six (66) persons -- a fence would separate the 'Patio' from the surrounding sidewalk and street. The City of Kingston has approved the 'Patio'.

The Cocamo is located in a busy downtown area on a main thoroughfare street. There are a number of hotels, bars and restaurants in the neighbourhood. There are three other licensed premises in close proximity with licensed Patios: Stoney's, Prince George and Hanley Station.

[At the time of the Tribunal hearing, the Hanley Station was operated under the new name of Joe College]

Objections to the issuance of the 'Patio' Licence were raised by a large number of residents in the immediate vicinity. Donald Lamarre, James Macpherson, Dorothy Wilson and Lorna Hand appeared on behalf of their respective condominium buildings; they are made parties to the proceedings pursuant to Subsection 12(3) of the Liquor Licence Act.

The main objections to the issuance of the Licence were raised by the residents of Harbour Place, 185 Ontario Street, located directly across the street from the Cocamo. Donald Lamarre, President of the Frontenac Condominium Corporation

Number 10 (Harbour Place) submitted a written presentation and states that: "We are a residential condominium of one hundred and twenty-three (123) units, many occupied by senior citizens...noise during the evening and until closing, particularly on week-ends, is most annoying to those facing the street, trying to sleep." Sixty-three (63) residences face the street.

In his written representation, Donald Lamarre outlined in detail many of the specific objections to having a 'Patio' outside the Cocamo Tavern. He states that "the Managers of the Cocamo have failed, to date, in controlling the noise and rowdyiness coming out of their establishment, particularly between the hours of 11:00 p.m. and 2:00 a.m. On many occasions, the doors of the Lounge are kept wide open and the extra loud music reaches us even behind our closed windows to the point where it is difficult for many of us to sleep. Between 1:00 a.m. and 2:00 a.m., the music is replaced by unearthly yells and screams from departing, and sometimes arguing and fighting patrons." Mr. Lamarre poses the question: "If management has been unable or unwilling to control noise and rowdyiness of patrons within its walls, can we expect any better when his clients are outside?"

The first witness from whom the Board heard oral testimony was James Macpherson, a resident of Harbour Place. Mr. Macpherson was the spokesman for approximately ten other residents from the building who attended the 'Hearing'. He indicated that they represented approximately two hundred and fifty (250) residents of Harbour Place. Mr. Macpherson stated that he was objecting to the 'Patio' on the basis that extending the licensed area outdoors would add to the noise and nuisance

problems that already troubled the neighbours of the Cocamo.

Macpherson testified that the Cocamo Tavern's clientele is unlike the clientele of other licensed establishments in that the sale of beer and alcohol appears to be the main commerce at the Cocamo. He stated that the normal 'Patio' crowd in the nearby establishments was quiet, but that the crowd at Cocamo's is not. He testified that he has observed patrons' behaviour as they leave the Cocamo and, in his opinion, they behave as if they have had too much to drink. He stated that he had called the police more than four or five times in the past year.

.....

Margaret Parrish, another resident of Harbour Place, also gave evidence at the 'Hearing'. She felt that the present noise problems would be worse if the 'Patio' was located outside the Cocamo. She stated that she had called the police regularly in regard to the present disturbances emanating from the Cocamo Tavern.

A number of letters to the Board from residents of Harbour Place objecting to the issuance of the Licence were filed as Exhibits at the 'Hearing'.

Dorothy Wilson is the Manager of St. Lawrence Place, a Retirement Residence for senior citizens, located across the street from the Cocamo Tavern. There are presently sixty-nine (69) persons residing there. Ms. Wilson testified that the present noise level is not conducive to sleeping and that one more 'Patio' would increase the noise level. She did state, however, that her main complaints were with the level of noise after 10:00 p.m.

Lorna Hand, a resident of Landmark Place, located at 165 Ontario Street, indicated that she supported the position taken by the residents of Harbour Place and St. Lawrence Place, although her building is not directly affected by the Cocamo. She testified that there is generally a high level of noise made by the patrons of all the nearby licensed establishments.

.....

Peter Fountas, President of the corporate Licence Holder, testified that he has been in the business for fourteen (14) years. He stated that the Cocamo Tavern is a part of a "bar strip" and that there are seven (7) licensed Patios within two blocks on Ontario Street. He agreed that there is a lot of noise in and about his establishment; the entire area attracts people. Fountas did not accept that his establishment is alone responsible for the noise level. Apparently, a nearby unlicensed pizza establishment named "Slices" attracts large numbers of patrons until well after 1:00 a.m.

Fountas testified that he wants the 'Patio' Licence because it is "necessary for the competition". Fountas made no reference to any measures taken by him to control the noise and rowdiness presently emanating from his establishment and there is no indication that there were proposed plans for doing so. Fountas did state that there is a noise problem on the street; he simply does not feel that his relatively small 'Patio' would add to the problem.

.....

It is clear from the evidence led, that there is a large body of nearby residents that is opposed to the establishment of a licensed 'Patio' outside the Cocamo

Tavern. This opposition is based upon the high levels of noise and disturbances on the street, particularly late at night. The residents attribute a significant amount of the disturbances to Cocamo patrons. The residents are not expecting the tranquility of a residential subdivision; they simply do not want their sleep disturbed late at night. Mr. Fountas did not dispute that the noise level on the street, particularly late at night, was a real problem. Nor did he dispute that his patrons were responsible for part of the noise. Given the size of his establishment, this would appear to be a reasonable assumption. The Board does not accept, however, the Licensee's position that a 'Patio' of sixty-six (66) persons would not in any way add to the noise levels. Even a well-run Patio serving alcohol would do so. About a quarter of the 'Patio' would be classified as a Lounge Licence where food need not even be available. The Board accepts that the Cocamo is more a nightclub establishment than a food oriented restaurant.

Precisely because of the nature of the area, the residents generally indicated to the Board their willingness to put up with quite high levels of noise until 10:00 p.m. They felt that noise levels from a licensed 'Patio' after that hour would further disturb their sleep and would be unacceptable. The Board agrees; the Board FINDS that a licensed 'Patio' operating until 1:00 a.m. is not in the public interest having regard to the needs and wishes of the nearby residents. The Board further FINDS that a 'Patio' restricted to a 10:00 p.m. closing would not be against the public interest.

The Board, therefore, ORDERS that the Licence be granted, subject to a TERM and

CONDITION that the sale and service of alcohol CEASE at 10:00 p.m. daily.

The Licensee/Applicant has appealed to this Tribunal from the Board's Decision and a hearing de novo has been held at Kingston which has taken four full days. During the course of this hearing, the Applicant modified its application from one for a 66 person lounge licence for the proposed patio to a 33 person dining lounge licence for the proposed patio with the sale and service of alcohol to cease at 11:00 p.m., and the Tribunal holds, as a finding of fact, that the application or matter before it is so limited.

The evidence presented at this hearing de novo before us was very much the same as that recapitulated in the Board's Decision, telling essentially the same story through the same or similar witnesses.

It seems that the essence of the problem is a conflict on the one hand between the perceived needs and wishes of a commercial enterprise (albeit one which may be said to serve a purpose desirous to many members of the urban community at large, both commercial and private, and to the policy-makers of the civic government as well, perhaps), and, upon the other, those of the neighbouring residents immediately adjacent thereto.

Section 6(1)(g) of the Ontario Liquor Licence Act reads:

- 6(1) An applicant for a licence, or for approval of the transfer of a licence other than a licence referred to in section 5, is entitled to be issued the licence or have the transfer approved except where

.....

- (g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

The Tribunal is customarily guided in reaching its decisions in cases of this sort by the following principles,

most recently enunciated in the Elm Flameburger decision, released October 6th, 1987 and reported in CRAT Summaries of Decisions Volume 16 (1987), page 103:

- the public must be aware that under the Liquor Licence Act, a person is entitled to a licence unless he becomes disentitled under any of the clauses (a) to (g) inclusive of Section 6(1) of the Act;
- since a person is entitled to a licence, the onus is on the objector to prove, on the balance of probability that, in this case, it is not in the public interest to issue it;
- the public interest must be determined in light of two aspects - (a) needs and (b) wishes;
- the issues of needs and wishes will not be decided solely on the basis of a head count;
- the concerns of the objectors must be bona fide; and
- the needs and wishes of the immediate residents will be given more weight than those of the transient trade.

The last stated of these principles is the governing one to us in this case, to wit, that the needs and wishes of the immediate residents ought to outweigh those of the transient trade. The spokespersons for these parties at the hearing gave evidence of a very noisy operation going on at the Cocamo which was also the source of a great deal of disorderliness degenerating at times to downright lawlessness, especially at what was referred to as "break-out time", that is to say, at 1:00 a.m., when the place closes and its patrons, a conspicuous number of whom are drunk and disorderly are discharged into Ontario Street. We have no doubt that this operation and its concomitants, viewed from the standpoint of the neighbouring residents, are and have been a nuisance of the most offensive nature made worse by the effusion of trash, refuse and other offal upon the residents' property and into their immediate environment and as well by having their

reasonable complaints given short shrift. Concerning this, the residents, objectors to the application before us, notwithstanding what was stated on behalf of the police, the municipal council and the applicant have the Tribunal's sympathy and its credence.

One problem, however, arising mainly or from the evidence of Alderman Helen Cooper gives us some misgivings. It was her stated opinion (as we understand it) that the proposed patio operation would prove to have an ameliorating effect upon the generally offensive nature of the subject operations and its consequences; that is to say, that the presence of dining tables proposed to be set upon sidewalks to be rented from the City, and occupied by persons partaking of meals accompanied or not accompanied by alcoholic drinks, would in practical effect have a restraining and modifying effect upon the atmosphere outside the Cocamo. We think the opposite effect more likely, viz., that by bringing the ambience of the Cocamo outside and having it on the sidewalk, as well as inside in the dining and drinking room, would intensify rather than mitigate the problems complained of by the residents. But we may be wrong. Therefore, in consideration of that possibility, the Tribunal directs that a one-year trial period shall take effect and that, after the patio licence permitted by the terms of this decision and order shall have been in operation for one full year (assuming that it goes into operation at all), the Board shall review and assess such operation and if, in its opinion at that time and as well in the opinion of all parties to this hearing, including the parties hereto who are representatives of the residents, the effect of such operation during such one year period, and contrary to our present opinion and contrary to the stated expectations of the residents, shall have been beneficial rather than exacerbating or aggravating to the general atmosphere in the subject residential vicinity, then the Tribunal directs that the Board shall be at liberty to extend the closing time of the patio to whatever hours the Board deems proper provided that all parties hereto agree thereto at that time (including the aforementioned representatives of the residents).

Apart from this provision, and in accordance with Section 14(3) of the Liquor Licence Act, the Tribunal upholds the Board's Decision that a patio licence shall be granted to the Applicant but that the sale and service of alcohol be discontinued at the hour of 10:00 p.m. The Tribunal further directs that the said licence shall be a dining lounge licence only and that the maximum number of persons to be served in such patio premises at any given time shall be limited to no more than 33.

WILLIAM F. MORRISSEY LIMITED
(MORRISSEY TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

RICHARD I. KESTEN, representing the Applicant

S.A. GRANNUM, representing the
Liquor Licence Board of Ontario

DATE OF

HEARING: 10 December 1987

Toronto

REASONS FOR DECISION AND ORDER

The Morrissey Tavern is situate on Yonge Street in the heart of Toronto where it has been operated for a period of perhaps 100 years.

The present owners who purchased the shares of the corporation in 1973 are Eva Talbot, Henry Talbot and Peter Dongas. The Tavern is a popular place for students at the University and the difficulties which brought the Tavern to the notice of the Liquor Licence Board were generated largely by the influx of students into the Tavern on February 24th, 1986.

The Proposal of the Chairman of the Liquor Licence Board was originally based on incidents which arose on November 23rd, 1985, February 16th, 1986, and February 24th, 1986, and the Proposal recommended a suspension of 21 days. In its Decision, however, dated July 6th, 1987, the Board waived its proceedings based on the allegations relating to the November 23rd, 1985, February 16th, 1986 incidents and accordingly, heard evidence only of the allegations relating to the evening of February 24th, 1986. Under the circumstances, although the Tribunal is empowered to hear evidence concerning past behaviour and conduct of the Tavern operators, its decision is based on the evidence it has heard regarding the February 24th, 1986 incident. (Re: Herman

Motor Sales Inc. and Registrar of Motor Vehicle Dealers and Salesman, Divisional Court 29 O.R. (2d), p.431.)

In its Decision, the Liquor Licence Board amended its original Proposal to suspend the Tavern licence for 21 days to a period of three days and it appears that as a result of that Order, some confusion arose as to the particular dates on which the Tavern was closed. As a result, the Tavern closed for a period of one evening but was advised by its solicitors to reopen immediately since the Order was ambiguous. Since that time, the Tavern has been open pending this appeal.

The physical layout of the Tavern is relevant to our consideration of the events which occurred on February 24th, 1986. There is a room commonly known as the "North Room" which according to the lounge licence may accommodate no more than 122 persons and a south section, the total permitted capacity of which is 119 persons. These rooms are divided by a bar in the centre but with access to each other by means of a passage way in the bar.

On February 24th, 1986, Constable Brian McMulkan, an officer with the Toronto police department who had been assigned to that area in 1986 entered the premises at approximately 10:30 p.m. He testified that he found 160 patrons in the North Room which was licensed for a capacity of 122. He spoke to Mr. Dongas who was in charge of the operation and advised him to reduce the crowd immediately. Returning about 12:30 a.m., he found some 139 persons in the North Room and arrested two for alleged drunkenness. He then ordered the bar closed. He further testified that at about 10:30 p.m., there was no doorman present although at 12:30 a.m., there was one in attendance. On cross-examination by Mr. Kesten, counsel for the Tavern, he said he used a mechanical counter on both occasions to ascertain the number in the premises.

Further evidence was given by Constable Paul Scuds, an officer of fourteen years service with the force who had been assigned to the area since 1985 and was particularly concerned with liquor licence offences. Scuds had attended at the Tavern in response to a request by McMulkan for assistance at 12:15 a.m. and testified that the North Room was in his opinion, very overcrowded and some patrons gave the appearance of intoxication. The result of his attendance was that a customer, one Brendon O'Brien, was arrested having been charged with being intoxicated in a public place.

Peter Dongas, on behalf of the Tavern, testified that he was working as Manager on Monday, February 24th, 1986. He said that his difficulties arose that evening because an influx of students had taken him by surprise and he had only one barman on duty. A doorman normally employed on Friday to check identification was not on duty and Dongas stayed at the door in place of a doorman. He said he was waiting for extra help to arrive which came later. When he was advised by Constable McMulkan that there were too many people in the rooms, he blocked the entrance to the bar and issued tickets so no new people could get in. He also said that at the south side of the Tavern, there was less than a capacity crowd and he persuaded some customers to go there. He did, however, contradict the evidence of the police officer saying that little, if any, overcrowding took place on the north side of the building. He had, however, apparently called the police for assistance and that action in itself indicates that the crowd had obviously got out of hand.

Thomas Dongas, brother of Peter Dongas, testified that he was working in the South Room most of the evening and although the North Room was busy, it was not overcrowded. His evidence, like that of his brother, contradicted that of the police officers with regard to the number of people in the two rooms.

One Angelo Tsianos, a waiter at the Morrissey Tavern for three years, was on duty during the evening of February 24th, 1986. He said he began working at 6:30 p.m. and by 9:30 p.m., the Tavern was crowded. He indicated that, in his opinion, there was full capacity but did not suggest overcrowding since he estimated at one time approximately 100 patrons in the north side. He further testified that he did not recall any incidents in which the police were involved. He also added that he could recall tickets being given out to customers only once in the past year.

The Applicant appeals from the Decision of the Liquor Licence Board of July 6th, 1987 wherein the Board found that it was in contravention of Section 8(16) of the Regulations under the Liquor Licence Act which reads as follows:

Every holder of a licence shall ensure that no more persons than the stated capacity of the licensed premises as set out in the licence shall be present in the licensed premises at any one time.

Having heard the evidence on behalf of both the Board and the Licensee, the Tribunal finds as a fact that the premises known as the Morrissey Tavern was clearly overcrowded on the evening of February 24th, 1986 beyond the capacity permitted by the licence. We appreciate the reserve adopted by the Dongas brothers in their estimates of the crowd, but their interest in the matter cannot be ignored. We also consider that the evidence of Mr. Tsianos may have been to some degree tempered by his employment at the Tavern and a generous disposition toward his employer. We are, however, of the view that the police officers concerned had no interest in the result, financial or otherwise, and accept their evidence as representing the facts as they found them to be. We reject that allegation in paragraph 5 of the Applicant's brief alleging harassment by the police and hasten to add, there was no evidence adduced to support it.

The Section reads "every holder of a licence shall ensure..." In our opinion, the words "shall ensure" create a strict liability on the owner as defined by Dickson J. in Regina vs. City of Sault Ste. Marie 1978, 40 C.C.C. (2d) p.353.

Trinor J. in Regina vs. Z-H Paper Products Limited 1980 27 O.R. (2d) p.570, adopts the Oxford dictionary meaning of "shall ensure", to make certain, to make safe against risks. Adopting this criterion can the Tribunal find that Mr. Dongas used all reasonable means available to him to make certain the incident of February 24th, 1986 would not happen?

He may have been caught by surprise but he was aware that students in great numbers came into the Tavern on Monday nights. He called for extra help but did not assign them to the door, but instead to serving patrons. He said he called the police at 11:00 p.m., but he had already been warned by Constable McMulkan that the place was overcrowded and instead of closing the bar, continued to allow people to enter. The Tribunal, therefore, finds as a fact that Mr. Dongas did not take sufficient precautions to remedy or control the situation and has, therefore, not satisfied the onus the statute places upon him.

With regard to the penalty, it appears from the evidence that pursuant to the original suspension of three days, the Tavern was closed for an evening or part thereof, but there was some confusion on that point. Under the circumstances, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Liquor Licence Board to order the Morrissey Tavern closed for a period of two days, the dates of which shall be in the discretion of the Board.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Licensee. The appeal had not been concluded at the time of this publication.

OXFORD HOUSE HOLDINGS LIMITED
(OXFORD TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE PATIO LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
ROBERT COWAN, Member

APPEARANCES:

IAN M. BOUNDY, representing the Applicant

ANNA McINTYRE, representing the Liquor Licence Board

ANDREW C. WRIGHT, representing Mrs. Lois Stevenson

DATE OF

HEARING: 1 December 1987

London

REASONS FOR DECISION AND ORDER

This is an appeal from the Decision of the Liquor Licence Board of August 21st, 1987, which attached a condition to the patio licence of Oxford House Holdings Limited, operating as the Oxford Tavern, that it cease to sell and serve alcohol at 11:30 p.m. Monday to Saturday inclusive. The Licensee had previously been able to serve alcohol on the patio until 1:00 a.m.

The Tavern, which is situate on the corner of Adelaide and Oxford Street and might be alluded to as a neighbourhood pub, has been in operation since 1934. There have been no complaints against its existence and it has even been enjoyed by some of those who now object to the patio which was added in 1985. The patio, as the name implies, is an outdoor area where liquor is served during the summer months. It obviously generates more noise than the adjoining rooms within the Tavern. Unfortunately for the Licensee, the streets surrounding the Tavern are residential and the neighbours consider the patio as one more intrusion into the peace and quiet of the neighbourhood to the extent that they have taken up a petition to restrict the hours of sale (Exhibit 8).

Mrs. Lois Stevenson, who seems to be the one most directly concerned, has even kept a log of the summer

activities on the patio (Exhibit 11). She resides on Piccadilly Street directly behind the Tavern and in her evidence refers to the noise from the patio superimposed on vehicle-related incidents. It must be noted, however, that both Adelaide and Oxford Streets are busy traffic areas with the concomitant noise.

Mrs. Stevenson, however, refers specifically to loud talking, sometimes obscene shouting, hollering, the stacking of chairs, clinking of glasses and the singing of songs such as "Happy Birthday." The cumulative effect of this after 11:30 p.m. she says, simply makes it difficult, if not impossible to sleep. She adds that the noise from the streets has just about doubled during the patio season.

Mr. Douglas English, President of the Piccadilly Neighbourhood Association, also gave evidence on behalf of the Board. The neighbourhood the Association represents is bounded by Oxford Street to the north, Adelaide to the east, Richmond to the west and the Canadian Pacific Railway to the south. There are approximately 65 households in the Association, but we note from the map on page 7 of the Record of Proceedings before the Liquor Licence Board that there appear to be only about 35 homes in the immediate area whose residents would be materially affected. Mr. English describes the patio operation as being "like a neighbourhood party" and he most strongly recommends the hours be restricted to 11:30 p.m.

He was followed by other witnesses, the most impressive of whom was Dr. Peter Ainsworth who also resides on Piccadilly Street and who, like Mrs. Stevenson, is most directly affected by the noise. Dr. Ainsworth was fair in his evidence pointing out that the traffic created much of the noise but that was increased by the sounds of cars entering and leaving the tavern parking lot particularly during the summer when the patio is in operation. The homes in this area are some 40 to 50 years old, generally have no air conditioning and consequently, the residents have their windows open during the summer months.

Of some significance is a letter introduced into evidence from the City of London to Mr. Douglas Drinkwater, Chairman of the Liquor Licence Board, which reads as follows:

I hereby certify that the Municipal Council, at its session held on May 4, 1987 resolved:

4. That the action of the Community and Protective Services Committee whereby the Committee requested the Liquor Licence Board of Ontario to reintroduce the 11:30 p.m. closing hour for the Oxford Tavern outside patio be confirmed; it being pointed out that the licence currently in effect at this establishment imposes a closing hour of 1:00 a.m. and expires on April 30, 1987; it being further pointed out that the neighbourhood residents have expressed their concern over the increasing noise and traffic generated by the patio.
(55.12.1) (4/9/CPSC)

K.W. Sadler
City Clerk

It might be noted, however, that the Tavern owner was not invited to express his views at that meeting. It is clear, nevertheless, that the lengths these residents have gone to restrict the patio hours certainly reflect their concern.

Mr. Boundy called Professor John Booth on behalf of the Tavern owner. He is an audiologist at the University of Western Ontario and well qualified to testify on the measurements of noise which he obtained on a \$12,000 sound meter. Professor Booth had attended at the Tavern parking lot of May 7th and 28th, 1987 and it was his opinion the noise from the patio was minimal. He said it was not a significant contributor to the noise of the area and the traffic appears to be the devil in the piece. He also attended in November of 1987 when the patio was closed and recorded a measurement of 78 decibels whereas 40 to 50 are acceptable. The obvious conclusion is, of course, that traffic is a major noise factor. Professor Booth, however, does not reside in the area and is not really able to comment on the patio noise over a long protracted period.

There are, however, other residents who either do not notice or are not offended by the operation of the patio, among them, a Larry Jackson, Derek Bilcliffe, Isabel Gallagher and William Gallagher, all of whom reside close to the Tavern. Their evidence simply corroborated that of Professor Booth that traffic and the parking of automobiles was the main problem.

Mr. Ted Zientara, co-owner and Manager of the Tavern,

was in our view fair in his evidence pointing out that he had tried to reach an accommodation with the neighbours even to the extent of spending \$12,000 to erect a 6 foot to 8 foot fence along the back of the parking lot. He said he could rectify the stacking of chairs and ensure that would occasion no further noise.

In the evidence of Inspector Bitz, we have the opinion of one who has no interest in the matter beyond his duty to the Liquor Licence Board as its inspector. He observed that the Tavern, according to the records of the Board, is an exceptionally well-run operation. The only complaint he had received was contained in a letter from Mrs. Stevenson in April of 1987 objecting to the noise from the patio.

He attended at the premises on May 28th, 1987 at 8:30 p.m. when there were 40 to 50 people on the patio. Any noise from the patio at that time was inaudible from the fence line. On a further attendance, on July 18th, 1987 between 11:40 and 12:15 a.m., his impression with about 50 people on the patio was that the primary sound came from the buses running up and down Adelaide Street and the bus stops on Oxford Street. He returned to the Tavern on July 23rd, 1987 at 10:05 p.m. spending 15 minutes there to assess the noise. Although there were some 40 persons on the patio, there appear to him to be no extraordinary noise.

His last visit was on Saturday, August 15th, 1987 at 1:00 a.m. when he parked his car at the south end of the parking lot and with the windows open heard employees stacking chairs. The evidence of Inspector Bitz, like that of Professor Booth, does not support the objections of the Board's witnesses but, as has been previously observed, neither of these gentlemen reside there. Inspector Bitz, however, does corroborate the evidence of previous witnesses that Thursday night is the busiest and there would tend to be more noise on that night than on others.

There appears to have been a fair if not equal accommodation between the Tavern and its neighbours for years but this balance has obviously been disturbed by the addition of the patio. Many of the residents appear willing to live with a situation which, though not Utopian, is at least not uncomfortable with the patio closing at 11:30 p.m. Beyond that time, they are disturbed during the hours they wish to sleep, particularly when they must work the next day. The extended patio hours have, therefore, clearly been an intrusion into their lives and the evidence of this is substantial if not

overwhelming. The peace which has endured for years between the parties has now been broken and this Tribunal is asked to end the conflict. There is, obviously, no solution other than to accede to the Proposal of the Liquor Licence Board which has made the same finding as the Tribunal. We quote from the Decision of the Board with which we concur:

The Oxford Tavern has been a feature in that residential neighbourhood since 1934 and its uninterrupted complaint-free existence (until recent events) is indicative of the ability of a commercial establishment to co-exist with the surrounding residential community. The establishment and licensing of the Patio in 1985 introduced a new factor into that relationship and changed the balance that had existed up to that time. It is probable that initially the residents were not in favour of the Patio intruding further into the residential compromise in accommodating both the commercial and residential interests. The residents could or were prepared to live with Patio noises and discomfort up to 11:30 p.m.

It is obvious, therefore, that a reasonable compromise can and should be reached ensuring a tranquil quietude for the neighbours and at the same time a measured latitude to the owners of the hotel and its patrons. The Tribunal, therefore, considers limiting the hours of sale to 11:30 p.m., Monday through Thursday and allowing the extended hours on Friday and Saturday to be a fair and equitable resolution of the matter.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby directs the Liquor Licence Board to carry out its Proposal to limit the hours of sale on the patio of the Oxford Tavern to 11:30 p.m. Monday to Thursday but permitting the extended hours of sale on Friday and Saturday.

GEORGE PAPALAZAROU
(HUBCAPS TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
TIBOR PHILIP GREGOR, Member
ROBERT COWAN, Member

APPEARANCES:

MICHAEL LYPKA, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 15 March 1988

Toronto

REASONS FOR DECISION AND ORDER

George Papalazarou is the holder of a dining lounge licence for a small restaurant (capacity 38 persons) located in a working class district of Hamilton, known as the Hubcaps Restaurant.

Following an investigation in May 1986, which disclosed that the Licensee was not complying with the Liquor Licence Act and regulations thereto, the Liquor Licence Board issued a Proposal dated July 22nd, 1986 to revoke the licence. The grounds for revocation were that:

- (a) contrary to section 55 of the Liquor Licence Act, the licence holder knowingly, has furnished false information to the Board in the statements of the receipts of sales of food and liquor in the licensed premises;
- (b) contrary to section 9(6) of Regulation 581/80, the total receipts from the sales of food in the licensed premises during the past six months have been less than 40% of the total receipts from the sales of liquor and food in the premises.

After several delays, a hearing was held and on September 22nd, 1987, the Liquor Licence Board ordered that the dining lounge licence be suspended for a period of three days. The Licensee now appeals that Decision before this Tribunal.

Evidence on behalf of the Board was presented by Frank Marzo and by Leslie Hebbard, both Investigators with the Board.

Mr. Marzo had carried out the investigation in May 1986. His testimony before the Tribunal essentially reflected his report to the Board of June 3rd, 1986, found in Exhibit 4. Mr. Marzo said that when he cross-checked the reported figures found in the returns filed with the Board with those entered in the daily sales journal, he found that they were not the same in that, while the liquor sales were accurately reported to the Board, the food sales were not. The food sales figures in both the sales journal and the returns disclosed that the food/liquor ratio prescribed in the regulations was not being met.

In his report, Mr. Marzo stated "...this remains basically a local neighbourhood 'gathering' place in the evenings with very little patronage during the day and, as such, will always have difficulty maintaining a ratio".

Mr. Marzo has not returned to the premises since his May 1986 investigation.

Mr. Hebbard visited the premises in November, 1987 following the Board's Decision. He too cross-checked the sales journal entries with the figures shown on the returns filed with the Board for the period January to October 1987. He found that the daily sales totals were accurately transcribed from the cash register tapes to the daily sales journal and that the returns filed with the Board contained the same figures. The figures show that during that period, the Licensee is still not meeting the prescribed food/liquor ratio.

In addition, Mr. Hebbard obtained beer and liquor purchase invoices from Brewers Warehousing and the Liquor Control Board of Ontario since the Licensee did not have that information. Mr. Hebbard then projected the sales which could be expected, using the Licensee's sale prices. He found that the reported sales for liquor and beer were lower than expected by some \$23,250.00. Although he did not mention this in his testimony, Mr. Hebbard in his report dated December 3rd, 1987 (Exhibit 5) stated that, "Even deducting a maximum of 10% for breakage and spillage leaves an unexplained \$10,039.00 of apparently unrecorded liquor sales".

Mr. Hebbard said that he could not get a reasonable explanation for this apparent discrepancy. He also stated that according to the sales tapes, most of the food sales appear to take place in the last quarter of the business day after a subtotal is taken. In his opinion, this pattern of sales was suspect.

Mr. Hebbard had visited the licensed premises on November 11th, 12th and 13th, 1987. He described the restaurant as a local neighbourhood bar located in a lower income area. The patrons were described as 'regulars' who came to meet friends and drink beer. It was Mr. Hebbard's opinion that the patrons were not particularly interested in eating although kitchen facilities, menus and food were available.

Mr. Papalazarou, who is married with two children, testified that he had bought the business in June 1984. At that time, he found that food sales constituted about 2 percent of total food and liquor sales. He said that by putting up signs, remodelling the premises and providing a broad choice of good food, he had increased food sales to about 20 percent of total sales. He and his parents work in the restaurant with additional hired staff. He said he had difficulty in retaining staff. Mr. Papalazarou stated that he had relied on Ms. Ormrod, who worked for him as a bartender, to complete the returns required by the Board. He stated that Ms. Ormrod was not a qualified bookkeeper, but that he had showed her how to complete the returns. He could not understand why the returns she prepared were inaccurate. Ms. Ormrod is no longer employed by Mr. Papalazarou.

Mr. Papalazarou testified that subtotals on cash receipt tapes are taken at the end of a shift of a waitress and that subtotals may be taken several times a day. He said he follows this practice to ensure that the staff is honestly reporting sales and for no other purpose.

Mr. Papalazarou explained that most of the food sales occur late in the evening because that is the time his customers come in after finishing their work shifts. He speculated that the \$23,000 discrepancy could be attributed to theft by staff. Mr. Papalazarou said he was obliged to keep his meal prices low because of the character of the neighbourhood. He pointed out that on the other hand, the price of liquor was going up. He readily admitted that at no time had he met the required 60/40 food/liquor ratio and that it was unlikely that he would or could do so in the future.

The Board, according to its Decision, imposed a three day suspension because it believed that Mr. Papalazarou was taking little or no action to improve his food sales and because it was very concerned about the false returns which had been filed.

According to Mr. Hebbard's evidence, information on the returns now accurately reflects the daily sales journal figures. Mr. Hebbard was suspicious of the liquor sales figures based on his extrapolation. There was no evidence before the Tribunal to either support or belie his suspicions. The Tribunal would be hard pressed to accept that the alleged discrepancy - whether it be \$23,250.00 or some \$10,000 could be attributed to theft. However, the Tribunal is satisfied that there is a problem in this area which must be addressed by the Licensee.

Without question, however, the Licensee is and will continue to be in breach of Section 9(6) of Regulation 581. This Tribunal cannot gloss over this breach of the law although it wonders what curative effect a suspension could have in the particular circumstances of this Licensee. It is also unlikely that terms and conditions would have the desired effect. On balance the Tribunal concludes that the three day suspension imposed by the Board is an appropriate penalty.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of September, 1987. The dates of such suspension to be determined by the Board.

PYL-CHEM HOTEL LIMITED
(ORCHARD PARK TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE AND LOUNGE LICENCES

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Vice-Chairman as Member
EMIL S. RINDERLIN, Member

APPEARANCES:

ROBERT B. McGEE, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATES OF

HEARING: 2 June 1988

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing de novo pursuant to section 14(1) of the Liquor Licence Act (the "Act") to appeal the Decision of the Liquor Licence Board (the "Board") suspending the Applicant's license in respect of the Orchard Park Tavern for a period of seven consecutive days.

It should be stated at the outset that no witnesses were called at this hearing on behalf of the Board. Accordingly, the only evidence before the Tribunal for consideration was the testimony of the witnesses called on behalf of the Applicant and certain facts set out in the Notice of Proposal or in the Board's Reasons for Decision which were admitted by the Applicant.

The premises in question are located at 1684 Queen Street East, Toronto, directly across from the Greenwood Racetrack. The Tavern is a large family-run establishment containing three levels. The basement is currently licensed as a dining lounge and has a capacity of 213 persons. The main floor and second floor are licensed as lounges and have a combined capacity of 825 persons. The Chemij family has, through their corporate entity, the Applicant, owned and operated the Orchard Park Tavern for the last twelve years. With the exception of one conviction that will be hereinafter referred to, a clean record has been maintained in respect of the Tavern throughout this period.

Counsel for the Board advised the Tribunal at the outset of the hearing that it would not be asking the Tribunal to deal with the allegations in the Notice of Proposal relating to the Applicant's food/liquor sales ratio. Therefore, that matter was not an issue considered by the Tribunal.

The Applicant has admitted that underage patrons were found by police officers on the premises on three occasions: October 21st, 1986; December 12th, 1986; and April 24th, 1987. It has also been admitted by the Applicant a charge of permitting an apparently underage person on the premises was laid by the police in respect of the April 24th, 1987 incident and to which the Applicant pleaded guilty. There is no evidence at all before the Tribunal to indicate that liquor was served to underage persons on any of the three occasions mentioned, or, indeed on any other occasion.

The Applicant has also admitted that on one occasion an intoxicated person was found on the premises by police officers. The Applicant, however, denies that the person in question had been served alcohol by its staff to the point of intoxication. The incident in question related to a female patron who passed out on the floor on April 24th, 1987. The Tribunal heard the testimony of Mr. Joe Racanelli, who has been an employee of the Tavern since 1954. He was on duty on April 24th, 1987 and spotted the woman in question. Mr. Racanelli testified that he saw the woman served one beer by the waitress on duty in her section. Mr. Racanelli observed that the woman "looked happy" and instructed the waitress not to serve her any more alcohol. He did later observe the woman going from table to table and he concludes from this observation that she must have obtained drinks from other patrons at these tables.

The Board called no evidence on this incident and accordingly the Tribunal has no basis for finding that the woman was served liquor at the Tavern while she was intoxicated or even to the point of intoxication. The Tribunal does find, however, that the Applicant permitted an intoxicated person to remain on the premises and that it failed to take prompt steps to have the person removed from the Tavern at the point when she was "cut off", and already "looking happy". One would reasonably anticipate that allowing the woman to remain on the premises after being cut off from direct service could result in her proceeding past the point of intoxication by getting other patrons to supply her with alcohol. In these circumstances, a patron who has had too much to drink should be asked to leave the Tavern. Mr. Chemij advised the Tribunal that this is in fact the policy at the Tavern. However, it

would appear that this policy has not been diligently carried out.

This constitutes the full extent of the evidence against the Applicant that this Tribunal has to consider.

The Applicant called evidence to show that steps are being taken to better control the entry of underage persons onto the premises. Certain renovations are planned by the Applicant which, when and if they are completed, shall result in a smaller total capacity and fewer entrances for patrons. In the meantime, the Applicant is attempting to control entry of patrons during their "rush" period immediately following the closing of the racetrack by locking some of the entrance/exits for a half hour period each evening so that all patrons must enter through the main entrance. This course of action causes the Tribunal serious concern as it results in a potential fire hazard since these doors do not have safety bars for emergency exit purposes. The Tribunal recommends to the Applicant that this locking of the exits cease immediately and until safety bars are installed on the doors. In the meantime, the Applicant should assign additional staff to screen patrons at these secondary entrances during the busy period.

The Tribunal also heard evidence that all members of the Tavern's full time management and staff and some part-time staff have attended the four hour "S.I.P." program offered by the Ontario Hotel and Motel Association. Inter alia, the Program deals with methods of identifying intoxicated persons and underage persons. The owners have also had Sergeant Marks from 55 Division attend to speak to their staff on these and related matters.

In the result, based upon the evidence that was put before the Tribunal, the Tribunal is of the view that a seven day suspension is not warranted. The Tribunal considers a one day suspension to be the appropriate disposition and by virtue of Section 14(3) of the Liquor Licence Act, the Board Decision shall be altered accordingly. The date of such suspension is to be determined by the Board.

RODEO RESTAURANT INC.
(PROMISES)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

M. GEROVASILIS, Director, Rodeo Restaurant Inc.

ANNA McINTYRE, representing the
Liquor Licence Board of Ontario

DATE OF

HEARING: 29 February 1988

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Decision of the Liquor Licence Board of Ontario dated September 11th, 1987, wherein the Board ordered that the dining lounge licence of the Applicant, Rodeo Restaurant Inc., now operating as 'Promises', be suspended for fourteen days.

The allegations contained in the Notice of Proposal dated October 3rd, 1986, were admitted by Michael Gerovasilis, the President of the corporate licensee. These allegations disclosed numerous breaches of the terms and conditions of the licence during the period January 17th, 1986 to July 17th, 1986. The Notice of Proposal appears to have issued as a result of a letter to the Board dated August 18th, 1986 from the Officer in Charge, Morality Bureau, Peel Regional Police Force. This letter outlined the numerous complaints received and charges (some 91) which had been laid both against the Licensee and its patrons from mid 1984 to July 1986. The charges included serving minors, serving intoxicated persons, assaults, and overcrowding.

The letter reads, in part, as follows:

All warnings and charges against the owners have all been in vain, as the tavern is still serving underage drinkers and serving persons well past the stage of intoxication...

It is the express feelings of the Police Officers involved that Topper's (now 'Promises') needs to be taken before the Liquor Licence Board for a hearing, as the laying of charges are obviously not doing the job. Possibly some sort of pressure imposed by the Board may change their minds to act in accordance with the rules of the Liquor Licence Board of Ontario.

Detective Thomas Lowry, with the Peel Regional Police, enumerated the various charges and penalties imposed against the Licensee and others. He described the business carried on by the Licensee during that period as being the worst in Mississauga as far as liquor related offences were concerned.

From the evidence of Jerry Wilk, an Inspector with the Liquor Licence Board of Ontario and Mr. Gerovasilis, the Tribunal gathers that the premises in question were renovated in January 1987 and that as a result, the character and clientele of the business has changed dramatically. There was no evidence to suggest that the Licensee or its patrons have been charged with any offences since the renovations have been completed.

The Tribunal inquired whether the food/liquor ratio was and is in compliance with the Regulation under the Act. The Tribunal was surprised to learn that reports had not been filed as required, and that no audit has been made to ensure that the ratios are being met. Some figures were presented by Mr. Wilk, however, he obtained them through Mr. Gerovasilis who in turn evidently obtained them by telephone from his accountant. There appear to be no records on the premises.

Mr. Gerovasilis admitted that mistakes had been made. He said that if the dining lounge licence is suspended, he will be obliged to close the business entirely. He said that three families are dependent upon the business for their livelihood, as are a number of employees. However, he added that if the penalty is imposed, it would be easier if the suspension takes place during the months of July or August when the financial impact of the closure would be less.

The Tribunal is satisfied that the Licensee, during the period 1984, 1985, and 1986 was in flagrant and repeated breach of the Liquor Licence Act and other statutes. It would be pointless to speculate why inspectors appointed under the

Act did not see and report these breaches to the Board given what was evidently a notorious situation as far as the local police were concerned. This Tribunal is left with the impression that the Board took no action until the local police department specifically brought the conduct of the Licensee to the Board's attention. The Notice of Proposal was to revoke the dining lounge licence. It was the decision of the Board that a suspension of fourteen days was appropriate.

The Tribunal notes that the Licensee, in the intervening period, has taken steps to correct the major problems specified in the Notice of Proposal. However, the Licensee continues to be in breach of the terms and conditions of its licence by not filing the statement of the total monthly receipts as required by Section 8(37) of Ontario Regulation 581 under the Act.

On the whole there is nothing before this Tribunal which would indicate that a different penalty than that imposed by the Board is in order.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 11th day of September, 1987. The Tribunal directs the Board to set the date of commencement of the said suspension.

600959 ONTARIO CORPORATION
(BROTHERS HOTEL)

APPEAL FROM A PROPOSAL OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE DINING LOUNGE AND LOUNGE LICENCES
AND TO REFUSE TO ISSUE A PATIO LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES:

BRIAN D. BARRIE, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 26, 27 April 1988

Owen Sound

REASONS FOR DECISION AND ORDER

Having received notice by the Liquor Licence Board of its intention to revoke their licence, the Licensee by agreement of counsel brings this matter before the Commercial Registration Appeal Tribunal directly pursuant to Section 14(2) of the Liquor Licence Act without a hearing before the Board.

The Licensee operates the Brothers Hotel in Owen Sound which consists of five dining lounge areas of varying capacities and a lounge area with a capacity of 97 persons. It is the lounge area that we are most directly concerned with since the Board's allegations of overcrowding refer specifically to that room.

The Board's Decision is based on several infractions, including overcrowding on four occasions, supplying liquor to an intoxicated person, advertising without receiving the permission of the Board and offering free drinks contrary to Section 24(4) of the Regulations and displaying a sign on the premises contrary to subsection (22) of the Regulations.

Evidence given in support of the Board's Proposal by Inspector Nelson Robertson and the several police officers who attended at the premises with him, leaves this Tribunal to the unequivocal conclusion that on three occasions, June 15th, 1986, July 31st, 1986 and January 2nd, 1987, there was serious overcrowding in the lounge area. This is supported even by the testimony of the hotel manager Blake Redmond who admitted, tha

particularly on the night of January 2nd, 1987, there were more people there than should be.

In mitigation, however, we have heard the evidence of Gregory Schmaltz, President of the corporation operating the premises. He pointed out that there were staff training programs in place for the employees, a manual they receive which includes a synopsis of the liquor licence rules and regulations and a government training program which is mandatory and which is known as the "Awareness Program". It is clear that Mr. Schmaltz desires to and does maintain a well-run operation attempting to ensure that all employees conform to the regulations. On the other hand, the evidence indicates this is a very competitive business and Mr. Schmaltz in his zeal to keep ahead of his competitors is inclined to be more aggressive than prudent. This is demonstrated by the advertising placed in the newspaper before permission was granted or received from the the Board although permission was requested.

This Tribunal is troubled by the appearance of animosity which has arisen between the liquor inspector, Nelson Robertson and some of the employees of the Licensee. It has been accentuated by correspondence and complaints by Mr. Schmaltz to the Liquor Licence Board concerning alleged harassment by Mr. Robertson. We do not find evidence of harassment, nor is there evidence of Mr. Robertson failing to cooperate with the owner. This is clear from Mr. Robertson's recommendation to the Board that the patio licence be granted.

This Tribunal does not find it necessary to review in detail all the evidence concerning each of the alleged infractions. We do not view any of them as serious, but it is obvious that their cumulative effect becomes a source of much concern to a liquor inspector who wishes to discharge his obligations according to the mandate given him under the Act. We have, however, found as a fact that on three occasions June 15th, 1986, July 31st, 1986, and January 2nd, 1987, there was considerable overcrowding in the lounge area contrary to subsection 8(16) of the Regulations.

The patio licence has not become an issue in this hearing, little evidence having been adduced by either of the parties for the consideration of the Tribunal. We therefore refer that matter back to the Liquor Licence Board for its consideration.

By virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Board to carry out its Proposal limiting it to revocation for one period of twenty-four hours, the date of which is to be set by the Board.

379157 ONTARIO LIMITED
(FEED LOT GROUP OF FINE RESTAURANTS)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE issued in respect of Dining
Lounge Number 4 and
TO SUSPEND THE LICENCE in respect of the upstairs
Patio for a period of twenty-one days.

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

LOUIS J. KOSMERLY, on his own behalf

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 17 May 1988

Kincardine

REASONS FOR DECISION AND ORDER

The Tribunal has considered the matter and had an opportunity to consider the proceedings before the Board and, particularly, wishes to bring to Mr. Kosmerly's attention, the second last paragraph in the Decision of the Board. It is at page 27 of the Record of Proceedings and reads as follows:

This is the first time that the Licence Holder has been before the Board. There is no problem with respect to the operation of the first floor restaurant which indicates that the Licence Holder is capable of operating a licensed premises in accordance with the Act. Therefore, the Board will not revoke the licence at this time. However, such conduct will not be tolerated. It is our hope that a meaningful sanction will cause Kosmerly to re-assess his position and attitude and bring it in line with the vast majority of Licence Holders in this Province. The attitude of his staff and patrons will no doubt follow suit.

The Board then suspended the licence in relation to Dining Lounge Number 4, together with the upstairs Patio for a period of twenty-one days, beginning Monday, February 29th, 1988 and continuing until Monday, March 21st, 1988. It is the Decision of this Tribunal that the Decision of the Liquor Licence Board shall be upheld and the suspension shall endure for a period of twenty-one days; the only variation being that the suspension will begin on November 1st, 1988 and expire midnight, November 21st, 1988.

[I might point out Mr. Kosmerly that one of the features of this matter which has been brought to our attention in the Board's Decision is that you are maintaining sirens in these premises, for what reason would appear to be obscure. On the assumption that those sirens although they do not contravene particularly any section of the Liquor Licence Act, are to continue, I wish you to know that in any future hearings before the Board or this Tribunal they will have an adverse affect on any application you may make in future. The Tribunal cannot in our view order you to remove the sirens. We leave that entirely to your own devices, but at the same time and under the assumption that they are not used simply for the enjoyment of patrons, you would do well to reconsider their future use.]

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 5th day of February, 1988; the date of such suspension to begin on November 1st, 1988 and expire midnight, November 21st, 1988.

CHAO LAN TSAI AND DONA FUNG
(DUNDAS DINER RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
DENNIS J. EGAN, Member

APPEARANCES:

DAVID H. NEWMAN, Q.C., representing the Applicants
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 5 January 1988

Toronto

REASONS FOR DECISION AND ORDER

The Licensees, Dona Fung and Chao Lan Tsai, hold a dining lounge licence for the "Dundas Diner Restaurant" located at 200 Jarvis Street, Toronto. The area in which the premises is located is not one of the more genteel neighbourhoods of the city. Many in the area are alcoholics or have problems with the use of alcohol. It is from this population that the Dundas Diner Restaurant and some of the other licensed establishments in the vicinity draw much of their clientele.

The Licensees purchased the Dundas Diner Restaurant and took over the licence for the premises in June of 1985. At that time, both were young Vietnamese immigrants who were relatively new to Canada. Dona Fung was only 19 years of age at that time, and was a recent graduate of Seneca College. After working at the restaurant as an employee for only one and a half months, she decided to join forces with Mr. Tsai, also an employee at the time, in purchasing the business for the sum of \$125,000.00. She was backed financially by her parents who borrowed the necessary funds from a bank. Ms. Fung testified that she wanted "something to start off with", that she "was interested in the restaurant business" and "wanted to be successful".

Unfortunately, it soon became apparent that the purchase of this business by these two young and inexperienced people was a mistake from the start. They lacked the skill and

experience needed to manage the staff and patrons of the establishment. Indeed, the Licensees were intimidated by their customers. The main area of difficulty was the failure to prevent drunkenness on the premises and the service of alcohol to intoxicated persons on the premises. These same types of problems were also encountered in other establishments in the area, establishments which share the same clientele, however, the Licensees appear to have been particularly unsuccessful in controlling the problems that arose.

The following allegations, set forth in the Notice of Proposal, were admitted by the Licensees:

- 3(i) The Licensees were on the 10th day of January, 1986, convicted in Provincial Court in Toronto and fined \$500.00 each for permitting liquor to be sold or supplied to persons in an apparently intoxicated condition on the 28th day of August, 1985, contrary to the provisions of the Liquor Licence Act and Regulations.
- (ii) On the 29th day of August, 1986, Chao Lan Tsai, one of the Licence Holders, was convicted in Provincial Court in Toronto and fined \$150.00 for permitting drunkenness to take place in a licensed premises and permitting liquor to be sold or supplied to an apparently intoxicated person in the licensed premises on the 29th day of November, 1985, contrary to the provisions of the Liquor Licence Act and Regulations thereunder.
- (iii) On the 10th day of April, 1987, Chao Lan Tsai, one of the Licence Holders, was convicted in Provincial Court in Toronto and fined \$200.00 for permitting drunkenness to take place in a licensed premises and permitting liquor to be sold or supplied to a person in an apparently intoxicated condition in the licensed premises on the 9th of September, 1986, contrary to the provisions of the Liquor Licence Act and Regulations thereunder.

- (iv) Contrary to Subsection 8 (35) and (36) of Revised Regulation 581/80 under the Liquor Licence Act, the Licence Holders did for the six months preceding October 8th, 1986, fail to maintain books and records that clearly and accurately set forth a daily record of purchases and sales of liquor and food in the licensed premises. A sales journal was available for the period February, 1986 to September, 1986 but no cash register daily totals were available and master cash register tapes, although available, were undated.

(With respect to paragraph (iv), the Licensees now seem to have their record keeping in order and there were no submissions made by counsel for the Board addressed to that issue.)

It was also alleged in the Notice of Proposal that:

- 3(v) On or about the 2nd day of February, 1987 at approximately 7:30 p.m., there were at least nine persons in the licensed premises consuming beverage alcohol that had been sold and served to them although they appeared to be in an apparently intoxicated condition. Beverage alcohol had also been sold and served to a person who appeared to be under the age of nineteen years, but whose name cannot be divulged because she was a juvenile at the time of the offence.

Based upon the evidence of the police officers who testified at this hearing, the Tribunal finds that the allegations set forth in paragraph 3(v) above have been proved on the balance of probabilities. There were further allegations set out in paragraph 3(vi) and (vii) of the Notice of Proposal; however, the evidence as to those allegations was mainly hearsay and insufficient to persuade the Tribunal as to the truth of those allegations.

With respect to the February 2nd, 1987 incident, the Tribunal notes that on that date the premises were "raided" by

police officers from 52 Division as were two other licensed establishments in the immediate vicinity. The evidence indicates that the intoxicated persons on the premises that evening included one on-duty waiter and one off-duty staff member. Both individuals are no longer employed by the Licensees. Some nine persons were arrested that evening at the Dundas Diner Restaurant and charged with being intoxicated in a public place. Most of the persons charged were persons known by the police to be alcoholics who frequented the area. A number had been arrested before for the same or similar offences. The police then proceeded to "raid" the nearby Mounties Tavern where other intoxicated persons were also arrested.

The evidence of the police officers at this hearing confirms that the Licensees have been receptive to and have co-operated fully with the police. They have attended meetings at the police station and have accepted the advice and assistance of the police officers. They have barred some thirty persons from the bar on a permanent basis. They now call the police more frequently when they encounter difficulties. Dona Fung testified that she feels less intimidated and better equipped now to deal with the rough clientele. Unfortunately despite the serious and sincere efforts that have been made by the Licensees, it appears to the Tribunal that they still do not have full control of the establishment. It may simply be beyond their reach. The Tribunal was advised that the Licensees have recognized this fact and are attempting to sell the business as a going concern.

The breaches that have occurred are regarded very seriously by the Tribunal. The Tribunal considers it appropriate in the circumstances of this case to order a suspension of the license for a period of time which reflects the seriousness of those breaches. The suspension should be lengthy enough to bring home to the Licensees the severity of the breaches.

The length of the suspension should also be consistent with that imposed on other establishments in similar circumstances. The Tribunal in its recent decision in the "Mounties Restaurant" matter (released December 21st, 1987), imposed a one week suspension of license. There the establishment was in the same area as the subject premises and many of the same problems were experienced by that establishment. As indicated earlier, "Mounties Restaurant" was one of the other establishments raided on February 2nd, 1987 by the same team of police officers that raided the Dundas Diner

Restaurant on that date. "Mounties Restaurant" also had some history of incidents involving intoxicated persons and drunkenness on the premises.

In this case, the Tribunal is of the view that it would serve no useful purpose to impose a suspension that would be so long as to result in the inevitable bankruptcy of the establishment. The Tribunal encourages the Licensees in their efforts to sell the premises to an experienced operator who can deal effectively with the type of clientele that is indigenous to this locale.

In all of the circumstances, the Tribunal shall by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, impose a ten day suspension with the dates thereof to be determined by the Board.

The Tribunal would also like to comment on a matter which came to its attention during the course of the evidence of one of the police officers in this hearing. It was indicated that reports of warnings issued by police officers to licensed premises are copied to the Liquor Licence Board. However, no copy is provided to the Licensees. This is, in the Tribunal's view, unfair to the Licensee as it prevents the Licensee from addressing the contents of the reports in a timely fashion. It is hoped that the Board and the police will consider revising this procedural policy.

WELLAND HOUSE HOTEL INC.
(WELLAND HOUSE)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE AND LOUNGE LICENCES

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
MICHAEL E. LERANBAUM, Member
DENNIS J. EGAN, Member

APPEARANCES:

PETER M. BARR, representing the Applicant

ANNA McINTYRE, representing the
Liquor Licence Board of Ontario

DATE OF

HEARING: 1 March 1988

Toronto

REASONS FOR DECISION AND ORDER

The applicant licensee, Welland House Hotel Inc., is the holder of a dining lounge and lounge licence issued under the Liquor Licence Act.

In January 1986, a Notice of Proposal was issued which alleged that on four separate occasions, persons apparently under the age of nineteen years or under the age of nineteen years had been allowed in the lounge area and in some cases, had been served with liquor. The Liquor Licence Board proposed to impose a seven day suspension, however, following a hearing, the Board, by its Decision dated July 31st, 1986, waived its Proposal "contingent upon these premises being operated in accordance with the Liquor Licence Act and Regulations from this time onward."

Several months later, evidently as a result of complaints from parents of minors, the Niagara Regional Police attended at several licensed premises, including the Welland House Hotel to check for minors. Following this raid, fourteen charges, seven under Section 8(5) and seven under Section 8(6)(a) of Ontario Regulation 581 were laid against Steve Lalos who is the Vice-President of the corporate licence holder and in charge of the premises at that time. According to the documents filed with this Tribunal, Mr. Lalos pleaded guilty to one count under Section

8(5) of the Regulation and was fined \$100.00. The remaining charges were withdrawn.

As a further consequence of these events, a new Notice of Proposal was issued by the Board proposing to suspend both liquor licences for a period of fourteen days.

Prior to the hearing before the Board relating to this second Proposal, another inspection of the licensed premises was made by the Regional Police on January 23rd, 1987. Again several minors were found in the lounge area, including two females, one fourteen years old, the other fifteen years old.

A Supplementary Notice of Proposal was issued on May 7th, 1987, related to this incident. A hearing before the Board took place on July 30th, 1987. It was the Decision of the Board that both the dining lounge licence and the lounge licence be suspended for a period of fourteen days. The Licensee now appeals that order to this Tribunal.

At the commencement of the hearing, counsel for the Licensee admitted only the fact that minors had been found on the premises on October 4th, 1986, but he did not admit that the persons appeared to be under the age of nineteen years. A similar admission was made with respect to the incident on January 23rd. Also admitted was the hearing and Decision of the Board of July 1986.

Evidence on behalf of the Board was provided by Constables Bryan MacCulloch and Grahame Abbott. They testified that they had gone to the Welland House Hotel on October 4th, 1986, at the direction of their Staff Sergeant to check for minors. Both constables were of the opinion that the persons that they had contact with that evening during the inspection appeared to be under the age of nineteen years and in fact were found to be minors, but they agreed that other persons could have formed different opinions.

Constable MacCulloch testified that two of the minors had false I.D. cards. Constable Abbott found that the person he was questioning had several pieces of identification which showed the correct age. Both also said that they had made regular patrols of the establishment prior to October 4th, 1986, but had never observed anyone apparently under the age of nineteen years.

Constable MacCulloch was also involved in the January liquor check and he said, he and his partner identified and charged the two female minors who were found sitting at a table, some 20 to 25 feet from an exit door drinking what appeared to be beer. He did not know how the minors gained entrance to the lounge or how they obtained the beer.

There was no evidence before this Tribunal that Steve Lalos was in charge of the premises on that evening. There was no evidence that he or any other person employed by the Licensee was charged as a result of this second general crackdown.

As far as Constable MacCulloch was aware, no charges have been laid against the licence holder with respect to minors since January 1987 although, three or four inspections of the premises a week are routinely carried out.

Evidence on behalf of the Licensee was given by Stanley Raptis, the President of the licensee corporation. Mr. Raptis appears not to have been present when the two police inspections took place. He speculated that the two young girls may have come through the exit doors. The Lalos brothers, who according to Mr. Raptis oversee the business on a daily basis, did not appear before this Tribunal to testify as to events which took place on October 4th or January 23rd.

Mr. Raptis' evidence related primarily to the action taken to discourage minors from entering the lounge area. This includes posting 'door girls' to check identification; repeated admonitions to staff not to serve minors; closing off a washroom door from the lobby and lately, the installation of an alarm on the exit door. Mr. Raptis said he has operated this business for fifteen years and aside from the two incidents has had a clear record with the Liquor Licence Board.

A hearing before this Tribunal is a hearing *de novo*. The Tribunal's decision must be based on the evidence before it and on no other information or allegations not specifically proven. However, where evidence is provided that a holder of a liquor licence is in breach of Section 8(5) or 8(6)(a) of Regulation 581, the onus is then on the holder of the licence to satisfy the Tribunal that all reasonable diligence had been exercised by the owner and his employees to insure compliance with those terms and conditions. There was no such evidence before this Tribunal.

The Tribunal finds that the Licensee, Welland House Hotel Inc. was in breach of the terms and conditions of its licence imposed by Section 8(5) or 8(6)(a) of the Regulation. The only other issue to be decided is whether the penalty imposed by the Board is appropriate.

This Tribunal is concerned by the fact that the Licensee did not act promptly to correct those deficiencies in its operations which allowed minors to enter the lounge premises. The Tribunal is particularly concerned that during the January 23rd, 1987 inspection by the police, two very young girls - counsel for the Licensee described them as being of 'tender years', were found in the lounge drinking beer. The Tribunal does not accept the speculation of Mr. Raptis as an explanation or excuse for this blatant disregard of the Act or Regulation by the Licensee and/or its employees. The Tribunal does not find it surprising that there have been no further violations of the Liquor Licence Act given that close inspection is regularly being carried out by the Regional police.

While a person is entitled to a liquor licence subject to certain conditions, the licence is granted on legislated terms and conditions. When a Licensee repeatedly fails to comply with these terms and conditions, a suspension is in order. The fact that on two occasions in the period of some four months, minors were found in the lounge premises, some of whom were consuming liquor, leads this Tribunal to conclude that the fourteen day suspension imposed by the Liquor Licence Board should be sustained.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 30th day of July, 1987. The Tribunal directs the Board to set the date of commencement of the said suspension.

DRAGO DOLIC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

MEMBERS: RONALD J. POIRIER, Vice-Chairman presiding
BARBARA J. NICHOLS, Member
FRANKLIN D. PROUSE, Member

COUNSEL: JOHN W. BURTON, representing the
Registrar of Motor Vehicle Dealers and Salesmen

No one appearing for the Applicant

DATE OF

HEARING: 12 April 1988

Sault Ste. Marie

REASONS FOR DECISION AND ORDER

This matter came before the Tribunal on the 12th day of April 1988 with John W. Burton representing the Registrar of Motor Vehicle Dealers and Salesmen; no one appearing for the Applicant. I am satisfied through the Exhibits filed that the Applicant was properly notified of this hearing and has failed to show either personally or through counsel.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal as filed.

GOLDHAWK SHIPPING LTD.
ROBERT J. WALTON
SUSAN L. BURTIS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATIONS

MEMBERS: JAMES GRAY LESLIE, Vice-Chairman presiding
DR. STUART E. ROSENBERG, Member
DONALD J. STRUPAT, Member

COUNSEL: JEFFREY GREENHOW, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATES OF
HEARING: 24, 25 November 1987 Toronto

REASONS FOR DECISION AND ORDER

This is a most unusual appeal by the Applicants for a motor vehicle dealers and salesmans' licence against the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen who has refused to grant registration. It is unusual in that the Applicants wish to be registered as a matter of convenience, to save transfer fees in the operation of the business and to have access to the wholesale market at the sametime contending that they are not required to hold a licence.

The facts are not generally in dispute and the Applicant, Robert J. Walton acknowledges that he has been in the business of the purchase and sale of automobiles for some considerable time without ever having made application for registration as a dealer. He had, however, been registered as a salesman employed with Brock Ford Mercury Sales Limited from August 8th, 1983 to June 2nd, 1986 and previously with Lincoln Mercury from January 2nd, 1983 to August 8th, 1983. This information, however, was not disclosed on his application for Goldhawk's registration as a dealer.

In his own application made on September 23rd, 1986 which is presently under appeal Walton had, however, disclosed his previous employment with Brock Ford in the capacity of sales manager.

Susan L. Burtis, one of the directors of Goldhawk Shipping Ltd. also made application as a salesman under the Act on or about September 23rd, 1986. She had previously been registered as a salesman employed by Brock Ford; the registration having been terminated as of June 2nd, 1986.

Walton and Burtis are President and Vice-President respectively of Goldhawk Shipping Ltd. which is a corporation incorporated under the laws of the Province of Ontario on May 30th, 1986. The head office is located at 280 River Road East, Wasaga Beach, Ontario. This company has been carrying on business under several trade names, among which are Burwal Leasing, Perfect Leasing and Fourway Leasing. These names were registered by Goldhawk and the business activity in each case is alleged to be the leasing of vehicles. The evidence, however, does not support the allegation, but on the contrary confirms the Registrar's submission that these agencies are in the business of buying and selling motor vehicles.

The facts confirmed by the evidence indicate that Goldhawk had as of the 26th November 1986, 16 vehicles registered in its name operating from 16 St. Joseph Street, Suite 29, Toronto and as of August 27th, 1987, a total of 526 vehicles were registered in the name of Goldhawk.

Burwal Leasing, also operating from 16 St. Joseph Street, on November 26th, 1986 had 16 automobiles registered in its name and as of the 27th of August, 1987 a total of 40.

Perfect Leasing comes into the picture as owning 10 vehicles as of November 26th, 1986 but in the name of Perfect Leasing Ltd., apparently an incorporated company, but no such company exists. Two addresses were given for Perfect Leasing Ltd., 101 MacDonald Street, Suite 101, Aurora and 280 River East, Wasaga Beach. At the latter address on August 27th, 1987 this entity had approximately 65 motor vehicles registered in its name.

Burwal Leasing Ltd., the company which has no corporate status, had on August 26th, 1986 a number of vehicles registered in its name operating from 16 St. Joseph Street, Toronto.

It would serve no useful purpose to recount the many transactions Goldhawk and Walton made in the name of T.J. Lizak, except to say that if Lizak had originally agreed to accept \$50.00 a car for a limited number of vehicles being registered in his name, the Applicants by far exceeded Lizak's

expectations and not only took advantage of but abused that privilege in a manner not authorized by Lizak. A record of transactions in the name of T.J. Lizak Ltd. discloses some 62 registrations in that company's name. We find unequivocally they were not authorized by Lizak, but simply another example of the clandestine operation employed by the Applicants.

The purpose of the scheme was simply to avoid the manufacturers' so-called 'blacklist' (Exhibit 16) which records the names of dealers exporting vehicles to the United States. Attached to a letter from the Ford Motor Company of Canada dated July 22nd, 1987 is a report listing names of dealers and individuals suspected of selling automobiles to the United States. The list contains the names of Bay River Lumber, Bay River Inc., Bay River Resort, Burwal Leasing, Goldhawk Leasing, Goldhawk Shipping Ltd. and Perfect Leasing Ltd., all of which entities were operated by the Applicants.

There is nothing illegal about selling Canadian automobiles in the United States, but the practice is frowned on by the companies and most dealers since there is a charge-back to the dealer and, as in the case of Lizak Ltd., warranties are delivered to the vendors when the automobiles are already in the United States. In his evidence, Mr. Walton said that he had sold only three cars in Ontario, one being sold to his brother, all the rest were exported to the United States. He further testified that one of the reasons he wished to be registered as a dealer was to give him access to the wholesale market. His interest appears solely to be in the export of vehicles to the United States.

It is clear from the evidence that the Applicants have been operating their business both within the law and outside the law. The nature of the business is not illegal, but the manner in which it has been carried on is a flagrant violation of the various statutes involved. The operation of Burwal Leasing Ltd. and Perfect Leasing Ltd. under corporate names when they are not incorporated companies is a breach of subsection 2(3) of the Corporations Information Act, R.S.O. 1980, Chapter 96 and a violation of Section 10 of the Business Corporations Act, R.S.O. 1980, Chapter 54.

We view the use of the Lizak company's name in the purchase of over 60 vehicles from 1985 to May 1986 as a serious misuse of the company's name which had no licence to trade in automobiles; its registration having been terminated in 1984. Although Lizak had, perhaps, agreed to the use of the name for what was called a 'four car package' initially, we find that

he did not extend this authority to cover the rest of the transactions.

It is also clear from the evidence that were the Applicants to be registered, they could not comply with the Motor Vehicle Dealers Act which requires the business to be operated under one name. Mr. Walton agrees that to operate successfully he must and has used numerous names for the purchase and sale of the automobiles. It is also evident that the manner in which this business has been operated and would continue to operate is not with the honesty and integrity contemplated by Section 5(1)(b) and Section 5(1)(c)(ii) of the Act. We, therefore, find the Registrar's Proposal to refuse to grant registration should be sustained.

Having made this finding it is unnecessary for this Tribunal to deal with the question of whether or not the Applicants are required to be licensed under the Act, except to point out that under Section 1(f), a motor vehicle dealer means "a person who carries on the business of buying or selling motor vehicles whether for his own account or the account of any other person or who holds himself out as carrying on the business of buying or selling motor vehicles." Mr. Walton and Goldhawk Shipping Ltd., in our view, fall within that definition and therefore the Act applies.

Mr. Greenhow has submitted the argument that the Applicants fall within the federal authority because they are engaged in trade with the United States. In that connection, he has offered a number of cases in support of this argument. We do not find it necessary to deal with this aspect of the matter having already decided that the Registrar's Proposal should be upheld. Furthermore, the issue of whether or not Section 1(f) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 in this case offends and is overridden by Section 91(2) of the British North America Act is not one for this Tribunal to decide. We are of the opinion that it is a judicial decision to be considered after proper service upon the Attorneys General for the Provincial and Federal authorities and, therefore, not within the scope of this administrative Tribunal.

The Tribunal, accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal.

JOSEPH ANTHONY WALKER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
HERBERT A. KEARNEY, Member

APPEARANCES:
ALEXANDER H. FISZAUF, representing the Applicant
JOHN W. BURTON, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 7 June 1988 Brantford

REASONS FOR DECISION AND ORDER

This is an appeal by Joseph Anthony Walker to the Tribunal from the decision of the Registrar refusing him a licence as a motor vehicle dealer.

The Registrar's Proposal reflects his concern about the past conduct of Mr. Walker who has several criminal convictions registered against him. They are as follows:

<u>Date</u>	<u>Offense</u>	<u>Disposition</u>
May 20, 1969	Theft under \$200	\$50 plus costs
November 24, 1977	Theft under \$200	\$200 fine
November 19, 1979	Possession of a prohibited weapon	\$75
February 25, 1983	Assault bodily harm	\$100
July 9, 1985	Assault bodily harm	90 days in jail served intermittently

As result, the Registrar has concluded that Walker, if registered, will not carry on business with integrity and honesty and in accordance with law.

In his defence, the Applicant has pointed out that the convictions gave a much more serious picture than the actual

offences warranted. He obviously tends to minimize these events considering them to have little relevance to this application or to his future behaviour.

The convictions for theft, one occurring in 1969 and the other in 1977, are in our view de minimus. The assaults, however, are a different matter. One was occasioned by his concern for his wife and children from whom he had been estranged since 1982 and, perhaps there were extenuating circumstances. Nevertheless it was a most brutal attack. The other assault, however, seems to have been virtually unprovoked and resulted in the victim requiring hospital treatment. It must be remembered that Walker, according to his own evidence, is a man skilled in the martial arts. Although these offences were disclosed to the Registrar, the evidence is, that in a conversation with the Applicant, the latter gave the impression these charges arose from relatively minor incidents whereas they were, in fact, most serious and savage attacks. The Tribunal nevertheless does not take the view that these offences ipso facto preclude the registration of the Applicant.

Mr. Walker is applying for registration as a motor vehicle dealer. What is his background? According to his own evidence, he is presently in what he calls "siding installation" working in the City of Brantford. He operated a martial arts business for four years. He has no background in the automobile business and now wishes to set up an automobile dealership which will be known as "Affordable Auto Sales". He has virtually no assets upon which to call to sustain the business. We presume he must contribute to the maintenance of his two infant children who are residing with his wife. These are the facts.

The Applicant has filed with the Tribunal a document called "An Outline of Business Plan" which is as follows:

Following licensing, I plan to start with two basic types of car-dealing activities.

1. "Flat-fee" method - I will act as purchasing agent for customers at automobile auctions. By this method I plan to earn commissions with no initial capital outlay of my own.
2. Buying and selling automobiles from my business premises in the usual course of business at 208 Greenwich Street, Brantford, Ontario, under the name

"Affordable Auto Sales". I plan to deal in cars, trucks and vans in the medium price bracket.

It would appear that the main purpose of Mr. Walker's application is to gain entry to the dealers' auctions. By taking the customer to the auction, he proposes to purchase an automobile with the customer's funds and conclude the transaction there. The Registrar, however, points that this conduct would be in contravention of Section 13(3) of Regulation 665 which provides as follows:

(3) Every motor vehicle dealer shall only operate from premises or branch premises,

- (a) that are approved by the Registrar;
- (b) that have an office for the conduct of business; and
- (c) upon which is erected a sign clearly visible, identifying the motor vehicle dealer's registered name and the premises to the public.

It would appear that Mr. Walker was unaware of that prohibition in the Act.

The second proposal of Mr. Walker involves the purchase and sale of autos at his own premises where he will also have a licensed "Class A" mechanic available. It has previously been pointed out, that he has no funds himself to operate the business. His evidence is that he will be financed to the extent of some \$15,000 by certain individuals in Brantford. It is, in our view, unfortunate perhaps that these persons did not appear to give evidence, because financial responsibility and stability is fundamental in the conduct of a business of this nature. But because of his inexperience in the business and his limited prospects in being able to finance the operation, we consider it would not be in the public interest to grant this appeal.

We are of the opinion that Mr. Walker's application would have been regarded in a different light had he been applying for a licence as an automobile salesman rather than a dealer, and note that he expects in the near future to be licensed as a real estate salesman.

It is our view that Section 5(1) of the Motor Vehicle Dealers Act has not been satisfied by the Applicant. Therefore by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, we direct the Registrar to carry out his Proposal.

RONALD BOND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

RONALD BOND, on his own behalf

STEVEN L. WESFIELD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 19 February 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Ronald Bond, entered into a three part or three-staged contract with Timbercroft Homes, makers of log cabin type structures through the latter's agent, Dan Wakelin (who also appears to have been the principal owner and operator thereof) for the construction, delivery and erection of certain, if not all, the elements of a log home.

The three component parts of the agreement were marked "A", "B" and "C" and dealt, respectively, with the provision by Wakelin and/or Timbercroft for the Applicants (Bond and his wife) of a "log home shell", of a "framing" package for the home, and, finally, certain sub-trade work. This contract was very vaguely and informally worded having many omissions and ambiguities and leaving much to be desired as a memorandum of agreement.

Neither Wakelin nor Timbercroft was registered at any relevant time as a builder under the Act.

A Construction Permit (Building Permit) was issued by Michael P. Godin, chief building official of the Township of Hope in which Ronald Bond was described as "owner" and to Dan Wakelin as "contractor". Bond paid for it in the approximate amount of \$640.00.

Section 6(1)(b) of the Ontario Building Code Act provides that:

The chief official shall issue a permit except where,

- (b) the applicant is a builder as defined in the Ontario New Home Warranties Plan Act and is not registered under the Act...

The Tribunal believes that this proviso creates an onus on the chief official to ensure that any builder-applicant is indeed properly registered under the Ontario New Home Warranties Plan Act before proceeding to grant the permit.

In our opinion, since the contractor was not so registered, it follows that this particular permit was not granted to the contractor but to Mr. Bond as owner.

After the building permit had been issued and the written memorandum of the agreement between the parties, such as it was, had been duly signed, Wakelin and Timbercroft went to work. Logs were brought, not to the property of Mr. Bond upon which the log house was intended eventually to be erected but to the more conveniently situated premises of Timbercroft, consisting of a kind of work-yard, on land rented by the latter and called the "display centre". Here the logs were cut to length, stripped, notched, shaped and in all ways turned into the component parts of what was referred to in the agreement as a "log home shell".

This process may properly be described as pre-fabrication. Thus the logs were prepared in Timbercroft's workyard and the shell of a log house, later to be assembled and reassembled, gradually took shape. But these logs and other structural elements, would not, even when fully completed, comprise the whole of the log house. One very important element in particular could only be created at the ultimate site of the intended home, namely, the foundation.

A "builder" as defined for the purposes of the Ontario New Home Warranties Plan Act in the Act's interpretation section (S.1(a)):

...means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner.

Therefore, to succeed in characterizing either Wakelin or Timbercroft as the "builder", the Applicants must convince the Tribunal that it was part of Wakelin's or Timbercroft's responsibility under the agreement (and in addition to everything else) to dig and pour the foundation upon which the log home was to be set. However, what actually happened was that Mr. Bond himself ordered and paid for the foundation which was poured to his instructions by a local foundation maker, Mr. Marshman, just prior to the winter freeze-up.

This circumstance is consistent with the thesis that Bond was acting as owner-builder, and that Mr. Wakelin and Mr. Marshman were merely sub-tradespeople or contractors working under his direction and responsibility.

Mr. Bond has attempted to counter this thesis or conclusion by stating in his testimony that, notwithstanding that it had been part of Wakelin's intended role under the contract to provide the foundation, Mr. Bond had been obliged to order and pay for it himself because Mr. Marshman refused to deal with Wakelin because of the latter's very poor business reputation and the fact that Marshman was sure he would not be paid by Wakelin.

Continuing with the facts, the gradually rising pile of logs and other materials back at the Timbercroft fabrication yard which was to comprise the log shell came to an abrupt halt with the sudden and distressful discovery of red-rot in eight of the logs and carpenter ants in one the logs. And as well that the beams meant to support the second story living accommodation of the residence were too weak to fulfil their load-bearing function. At this point Mr. Bond declared his agreement with Wakelin and Timbercroft null and void and applied to the Warranty Program for a payment from the Compensation Fund of some \$14,000 or \$15,000 made up of deposits, fees for professional reports, and other items.

Mr. Bond took these steps despite the fact that Wakelin had written him offering to replace the deficiencies thereby completing the agreement in full, albeit at the cost of some delay, but pleading that the agreement had not been specific as to time of performance.

Mr. Bond's reply to this was that each log, once cut and notched and set in place was a unique and perfect part of the whole structure and incapable of replacement or substitution. He therefore declined to give Wakelin a further chance to complete the agreement between them.

The Warranty Program, whose officers had received no previous intimation of the foregoing events, took note of Mr. Bond's claim against the Compensation Fund with interest mixed with caution.

Eventually, after due study, a decision letter was issued by the Warranty Program over the signature of Mr. Nelligan, in which liability was declined on the grounds that for the purposes of the claim and upon the fact situation underlying it, neither Wakelin nor Timbercroft was a "builder" as defined by the Act, in that neither Wakelin nor Timbercroft had undertaken to supply "the whole" of the home in question".

From that decision the claimants have appealed to the Tribunal.

We conclude that Section 14(1)(a) of the Statute is of central importance in establishing the claim, and it reads as follows:

14.(1) Where

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the ...vendor's failure to perform the contract, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage...

Assuming that the claimant has a cause of action as specified, then before we can make an award against the Compensation Fund, it is clear that this Tribunal must assure itself that Wakelin and/or Timbercroft were in fact a "vendor" as defined.

The definition of "vendor" (found at subsection (n) of S. 1) is different from that of a "builder" (found at subparagraph (a), i.e.

"Builder" [as stated above]

- 1.(a) means a person who undertakes the performance of all the work and supply of all the materials necessary to

construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner.

But the word "vendor" (defined at Section 1.(n))

...means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

Note: to be a "vendor", i.e., one who may be liable or one who in respect of whom the fund may be liable, by operation of S. 14, or otherwise, one need not necessarily fulfil all requirements of S.1(a) as to the status of a "builder" or even be a "builder".

But to be a "vendor" for the purposes of the Act and with the consequences thereto potentially relating, one must be, a seller of a "home".

As defined at S.1(d) "home" means:

- (i) a self-contained one-family dwelling, detached or attached to one or more others by common wall
- (ii) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (iii) a condominium dwelling unit, including the common elements, or
- (iv) any other dwelling of a class prescribed by the regulations as a home to which this Act applies,

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary period or for seasonal purposes.

On the facts of this case as we find them, what

Wakelin and/or Timbercroft contracted to sell to the Applicants was a collection of services and chattels, all necessary ingredients for a log home, but amounting, in their totality, to something considerably less than a whole home as defined. Therefore neither Wakelin nor Timbercroft, in our finding, was a "vendor" as defined.

We also find upon the evidence that Mr. Bond's decision to cancel the contract with Wakelin and/or Timbercroft has not been proven to have been necessary or unavoidable.

It has not been proven to our satisfaction that any contractual responsibility for the making of the foundation existed on the part of Wakelin and/or Timbercroft. Thus it has not been demonstrated that either Wakelin or Timbercroft was a "builder" as defined (i.e., one who provides everything).

We are not satisfied that the building permit was issued to Wakelin as a "builder" - either as one registered under the Act or not. We think it more likely, whatever his recollection now may be, that the permit to build was issued to Mr. Bond as owner with Wakelin to act, as stated on the face of it, as his contractor and no more.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MAURICE BRANCO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
D.H. MACFARLANE, Member

APPEARANCES:

MAURICE BRANCO, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 12, 31 October 1988

Toronto

REASONS FOR DECISION AND ORDER

This was an application by Maurice Branco for damages against the Program in respect to a new home acquired by the Applicant on September 22nd, 1985. It appeared on the evidence submitted to the Tribunal over a two day period that while there had been a substantial number of complaints submitted by the Applicant, these had all been thoroughly investigated by the Program, both before and after the conciliation.

The conciliation was conducted at the Applicant's home on November 11th, 1986 and a report issued December 4th, 1986. In this report, 9 items were required to be remedied by the Builder and 27 items were specified as not being covered by the Program under the terms of the Act. The Program, following further complaints from the Applicant, re-inspected the home on a number of occasions: February 1987, January and April, 1988. On the basis of such inspections, the Program was satisfied that the 9 items covered by the warranty under the Act had been satisfactorily completed and, therefore, disallowed the Applicant's claim.

Notwithstanding, the Applicant raised before the Tribunal complaints with respect to 17 items - 3 of which were contained in the conciliation report as items subject to warranty. The evidence presented to the Tribunal consisted of the oral testimony of the Applicant and the testimony of two very experienced inspectors from the Program's Kitchener office. The Tribunal was impressed with the straightforward

and fair testimony of these inspectors and the efforts which they had made to satisfy Mr. Branco. Nevertheless, there may be a few matters which should be resolved in favour of the Applicant and these will be discerned in the review of the Applicant's complaints as identified herein.

The following items were the subject of the Applicant's claim against the Program, together with the Tribunal's assessment of such claims:

1. Door to Garage at Laundry Room Drafty.

This was a warranted item in the conciliation report. The evidence indicated that the builder made repairs and both inspectors testified that such repairs were effective. The Tribunal is satisfied that there is no defect in material and workmanship in respect to this item.

2. Only one Electrical Receptacle Outlet in Garage.

When Mr. Hagan conducted his first inspection, there was more than one outlet. Mr. Branco indicated that as an electrician, he had added such receptacles. He indicated that these were minor items of cost and produced no evidence of cost. On the basis of this evidence, the Tribunal is unable to award any allowance to Mr. Branco in respect of this item.

3. Third Stair Tread is Loose.

This is the second warranted item. While this tread has squeaked and has been repaired by the insertion of finishing nails which both inspectors indicated was acceptable, Mr. Branco continues to complain of a squeaking stair tread. The Tribunal cannot find however that this is a breach of a warranty of material or workmanship, nor is it a structural defect.

4. One bedroom very cold.

Both inspectors found this room not to be unusually cold and conducted reasonable tests to so ascertain. The Tribunal therefore finds no breach of warranty in respect of this item.

5. Small Chip in Tub.

No reference to this item was made in Mr. Branco's initial inspection report and Mr. Hagan indicated that he could not say how it originated. In the absence of the identification of such item in the original inspection report, the Tribunal cannot find the Program in error in rejecting such claim.

6. Water Hammer.

Both inspectors indicated they were satisfied that

remedial work had been undertaken by the Builder and that in normal operation, no such hammering occurs. Both inspectors tested the faucets and found no unusual hammering. The Tribunal is not satisfied therefore that this claim is covered under the Warranty Program.

7. Boxing in of Piping in Basement.

Because of the location of the basement window, the repairs to the kitchen piping will have to be boxed in. The Tribunal finds this not to be a warranted item.

8. Master Bedroom Ceiling.

Both inspectors found the undulations of which Mr. Branco complained to be within acceptable standards and the Tribunal finds that the Applicant has failed to establish that such ceiling is not within such acceptable standards.

9. Cracked Fireplace Brick.

The Applicant has failed to establish to the Tribunal's satisfaction that the cracked fire brick is significant or a fire hazard. The photograph of such brick produced to the Tribunal reveals it to be quite insignificant.

10. Paint Around Front Windows.

The evidence indicated that this item was reported after the first year and therefore is not covered by the warranty.

11. Two Cracks in Basement Wall.

This is the final item identified in the items covered by the warranty. The evidence presented in this regard was somewhat skimpy and the photographs presented were hard to decipher. Counsel for the Program indicated that if there was a continuing problem, then such was covered by the Program's warranty. The Tribunal is of the view that further investigation of this item should be undertaken.

12. Light fixture in northwest basement never worked.

The evidence of all witnesses seemed to confirm that this fixture was not operational. Mr. Branco indicated that it had never worked and the inspectors informed the Tribunal that it did not work, but were uncertain as to whether Mr. Branco may have done some wiring in the basement which may have caused this. The Tribunal in this instance is prepared to give Mr. Branco the benefit of the doubt raised by him.

13. Door to Cold Cellar.

The Applicant argued that the door must be insulated

under the provisions of the Building Code. The Tribunal is satisfied that Section 9.6.4.4 of the Code exempts doors from unheated cold cellars having to be of a certain thermal resistance. No evidence was submitted to the Tribunal of any specific requirement for cold cellar doors and therefore Mr. Branco's submission that a solid core door was required is not substantiated. In fact, the application of styrofoam to the door would appear to conflict with fire regulations and should be removed forthwith.

14. Condensation in Cold Cellar.

As this is not an insulated room, some condensation would be normal and the Tribunal finds no excessive condensation has been proven by the Applicant. The Tribunal did note, however, that there appeared to be a dangling light fixture in the cold cellar which should be securely fastened.

15. Downspouts and Gutters smashed.

Evidence before the Tribunal clearly indicated that such was caused by a third party, and not the Builder. Therefore, this claim cannot be sustained.

16. Sewage Problem.

This item was reported after the first year and must therefore come within the definition in the Act of a major structural defect. The Tribunal is not satisfied either that such is a major structural defect or that, in fact, it was caused by the Builder.

17. Mortar cracks.

These were identified as having been reported after one year and are not a major structural defect. Thus, they are not covered under the Warranty Program.

Having examined all the above complaints asserted by the Applicant, the Tribunal by virtue of the authority vested in it under Section 16(3) of the Ontario Home Warranties Plan Act, directs the Ontario New Home Warranty Program:

- i) to check the cracks in the basement walls, water test such walls and, if such walls are found to be unsatisfactory, repair such walls, either by internal or external means at the sole discretion of the Program;
- ii) to repair and activate the electrical light fixture in the basement which has never operated;
- iii) to cause the styrofoam on the cold cellar door to be removed, and to sand and paint such door after the removal; and
- iv) to securely affix the dangling light fixture in the cold cellar.

BRANWOOD ESTATES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
RICHARD F. STEPHENSON, Member
D.H. MACFARLANE, Member

APPEARANCES:

BRANDON MAHAFFY, President, Branwood Estates Limited

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 12 April 1988

Toronto

REASONS FOR DECISION AND ORDER

The Registrar has issued a Notice of Proposal to refuse to renew the application of this builder, Branwood Estates Limited, on the grounds that the builder does not have sufficient technical competence to consistently perform the warranties as evidenced by the workmanship related to the home construction on 18 Shallot Court in North Bay.

The Shallot Court home is the first and only home ever constructed by this builder. Construction was commenced in 1984 and, as at the date of the hearing before this Tribunal, was still not completed. The Tribunal heard evidence from the Program inspectors as to numerous deficiencies observed by the at various times over the period of construction. The Tribunal was also presented with evidence that the City of North Bay has issued at least four different "Orders to Remedy Violation" under the Building Code Act in respect of the property, with each Order setting forth numerous deficiencies and Code infractions. At least two "Stop Work Orders" were also issued by the City of North Bay. At one time, the builder was proceeding with construction without being the holder of a valid building permit.

The Tribunal also heard evidence that the builder has put the home on the market on a number of occasions and has entered into Agreements of Purchase and Sale with at least two purchasers in respect of the Shallot Court house. In each case, the Agreement was eventually terminated due to the failure of the builder to proceed with and complete construction of the home in a reasonably timely fashion.

Both of the Program inspectors who testified at the hearing were of the opinion that Mr. Mahaffy, the principal behind Branwood Estates Limited, did not have the technical competence to construct homes in accordance with the requirements of the Ontario Building Code.

Mr. Mahaffy is a young man with a strong desire to succeed in the residential construction business. Mr. Mahaffy appears to have some original ideas in respect of house designs. His designs are directed to what he described as the "upscale executive market". The photographs of the Shallot Court home that were put before the Tribunal in evidence certainly reveal it to have an attractive exterior.

Mr. Mahaffy blames his difficulties in constructing the Shallot Court house on, respectively, the real estate agents he dealt with initially, his suppliers, his competitors, the building department staff, the disgruntled first purchaser, and the neighbours on Shallot Court. It is the Tribunal's view, however, that the builder's lack of experience and technical knowledge was in large measure the reason for the problematic history and extraordinary delays that have occurred in respect of the Shallot Court home.

The Tribunal does note, however, that to the builder's credit, he has not abandoned this project, but has tried to correct all of the deficiencies and to satisfy all of the concerns of both the City of North Bay's Building Department and the Program inspectors, albeit over a long period of time. Mr. Mahaffy stated a number of times that he intends to complete the house in question so that it is "perfect" as he plans to have it to serve as a showpiece for his product.

The Tribunal appreciates that Mr. Mahaffy has, throughout, had every intention of completing the Shallot Court house in a timely manner and in accordance with Ontario Building Code requirements. Unfortunately, good intentions have not been enough in this situation. The Tribunal must keep uppermost in its mind the need to protect members of the public who may be purchasing new homes from builders. These purchasers are not normally in a position to conduct an independent investigation of the history of a particular home builder. The Program, in determining what builders are permitted to be registered under the Ontario New Home Warranties Act, in effect, takes on the responsibility of investigating the history of, and monitoring builders on behalf of all prospective purchasers. In this case, the Tribunal is of the view that the Program's Proposal not to renew this builder's registration has a legitimate and compelling

foundation. The builder will, however, be permitted to proceed with and complete the construction of the Shallot Court house, and the registration shall continue for this limited purpose only.

The Tribunal would like to convey to Mr. Mahaffy that he is not being barred from the residential construction industry for all time and that while the loss of his registration will no doubt be a set-back to his business ambitions, he can still pursue a career in this industry preferably under the wing of a more experienced builder. After he has acquired the additional experience and knowledge that he presently lacks, he can perhaps apply for registration anew. In this view, the Tribunal specifically directs the Program to consider any further application for registration by Mr. Mahaffy on its own merits upon being reasonably satisfied that construction of 18 Shallot Court, North Bay has been completed in a workmanlike manner, free from defects in material, fit for habitation, and in accordance with the Ontario Building Code.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act the Tribunal directs the Registrar:

1. To refuse the renewal of the Applicant's registration, save and except that the Applicant shall be permitted to complete the construction of the home at 18 Shallot Court, North Bay, provided that he posts a letter of credit or surety bond in the sum of \$15,000 with the Program as security for the performance of his warranty obligations which security shall remain in place for a period of one year after the possession date of the home.
2. The Program is further directed to consider any further application for registration by the Applicant or by the President of the Applicant, Mr. Branwood Mahaffy, on its own merits upon being reasonably satisfied that the Applicant has completed the construction of the home at 18 Shallot Court, North Bay in a workmanlike manner, free from defects in material, fit for habitation, and in accordance with the Ontario Building Code.

GIUSEPPE BRUNDIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

GIUSEPPE BRUNDIA, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 22 January 1988

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Decision of the Ontario New Home Warranty Program dated July 20th, 1987, wherein the Program disallowed the claims of the Applicant, Giuseppe Brundia. The Program had concluded that the three cracks in the front porch of the Applicant's home had been rectified by the builder, but noted that the repair had created a discolouration across the slab and that a vertical crack in the concrete foundation wall at the north basement window of the house did not constitute a major structural defect as defined in the Regulations to the Ontario New Home Warranties Plan Act.

The Tribunal is satisfied that since the claim with respect to the crack in the foundation wall was made beyond the first year of possession and since there appears to be no water penetration or any adverse effect on the use of the basement as a result of this crack, which is quite fine, the crack cannot be considered to constitute a major structural defect. Consequently, Mr. Brundia's claim with respect to this item must fail.

The issue with respect to the cracks on the porch slab is considerably different. The Ontario New Home Warranty Program took the position that the cracks had been repaired and that in any event, the claim with respect to these cracks had not been made within the first year. The Tribunal rejects both these submissions.

In the Certificate of Completion and Possession (which the vendor is required to file with the Program within fifteen days of possession), there is reference to 'fill crack front porch'. In the Tribunal's opinion, this is clear evidence that the Program had notice of the cracks in the slab within the first year. Counsel for the Program said that this Certificate had not been filed with the Program. It would be strange indeed to have a builder and subsequently the Program escape liability through a failure of the builder to file the Certificate as required. The Tribunal rejects such a consequence and deems that the Program received the Certificate within the first year.

The Tribunal hesitates to dignify the work that was done by the builder to the slab as 'repairs'. From what it was told and could see from the photographs filed, the builder slapped on some yellow-brown epoxy over the cracks and left. The builder now wishes to cover up the mess with a coat of paint. The Program apparently agrees that this is good enough. With respect to the Program's judgment, this, in the opinion of the Tribunal, is not good enough.

Mr. Brundia said that aside from the unsightly mess left, the cracks continue to leak water into the basement. He said that as a result, he had suffered considerable damages. The evidence of the Program was that there was no leakage or water penetration. Whether or not there is continued water penetration, the Tribunal is more than satisfied that the 'repairs' to the three cracks on the porch slab were not made in a workmanlike manner and this must be corrected.

Mr. Brundia has suggested that the porch slab be covered with ceramic tile. This would cover the epoxy and would presumably prevent any further water penetration. The Tribunal is not prepared to make such an order. However, the cracks must be properly repaired. The present epoxy is to be removed, the cracks are to be filled with a suitable material and the slab is to be made smooth. To this end, the Tribunal orders the Program to obtain three estimates to make the proper repairs and to give Mr. Brundia the option of either having the repairs made or being paid the amount of the lowest bid to effect the repairs himself.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim with respect to the crack in the foundation wall and to allow the claim with respect to the

cracks in the porch slab by either having the repairs properly carried out following the submission of three independent estimates or by paying the amount of the lowest bid directly to Mr. Brundia.

BEL M. de PINHO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
D.H. MACFARLANE, Member

APPEARANCES:

BEL M. DE PINHO, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 August 1988

Toronto

REASONS FOR DECISION AND ORDER

Having purchased a new home from The Wycliffe Group Ltd. in Richmond Hill, Mr. Bel M. de Pinho took possession on August 27th, 1986. There were at that time some 19 complaints of unfinished work. He enumerated these in a letter to the Ontario New Home Warranty Program on November 11th, 1986. Despite whatever negotiations took place between him and the builder, there were on May 20th, 1987, still 15 matters to be addressed. This is contained in his correspondence to the Ontario New Home Warranty Program of that date.

Six of the complaints had been satisfied by August 20th in 1987 at which time, 13 were outstanding. But by November 7th, 1987, only six remained in issue. De Pinho then requested conciliation and advised the Program accordingly. It is to be noted that there is no time limitation argued by the Program as a bar to the claims of the Applicant. The question therefore before the Tribunal is simply whether there is a defect in materials or bad workmanship or both.

It is to the credit of the parties involved, Mr. Bel M. de Pinho and the builder, that eventual conciliation involved only six items and thus crystallized these few issues for the consideration of this Tribunal. It is also to be noted that the record of Wycliffe in the construction of homes is impressive, having had to deal with only 8 complaints out of their 537 homebuyers in the past five years although this is certainly not relevant to the issues before this Tribunal.

At tab 6, Exhibit 5 of the Ontario New Home Warranty Program Exhibits, there appears the conciliation report of Mr. Douglas Irvine of the Ontario New Home Warranty Program. The sixth complaint is being looked after by the builder and therefore need not be considered by the Tribunal. Concerning Items 3, 4 and 5 of that report, we accept the evidence of the inspector and they are therefore disallowed. We have, however, been troubled by Items Nos. 1 and 2 which we consider raise issues involving not only the builder, but the industry. Taken from the conciliation report, they are as follows:

1. COMPLAINT - Five kitchen cabinet doors have black stains and need replacing.

OBSERVATION - The above complaint refers to mineral marks in the finished cupboard door material on four of the lower and one upper panelled doors in the kitchen. The mineral stains were not considered to be excessive (see photograph) and a letter of explanation for the cause of this problem is on file from the manufacturers of the cabinets.

2. COMPLAINT - Sections of railings on first and second floor do not match in colour and require replacement.

OBSERVATION - Complaint refers to the natural oak stained handrail which is installed on a circular basis from the top of the second floor to the basement. The owner's complaint refers to the various colour shades in the finished handrail most specifically at the top section and lower sections of the rail. The colour variance is due strictly to the wood grain and veneer finish and is beyond the control of the builder or manufacturer. This is a common inherent with wood. It is understood that the owner had previously refused to allow replacement of sections of railing by the builder's supplier as they have insisted on a entire new railing. This is not necessary under warranty and this is not an item that is covered by warranty.

The Applicant placed in evidence as Exhibit 6, photographs of two of the cupboard doors of which he complained. They bear marks which give the impression that they had at some time been burned. There are blemishes on the wood and certainly detract from its appearance. The builder

counters with a letter from the manufacturer, Paris Kitchens dated November 26th, 1987 which was entered in evidence in the Ontario New Home Warranty Program documents (Exhibit 5, tab 5) and is as follows:

November 26th, 1987

The Wycliffe Group Ltd.,
34 Doncaster Avenue,
Thornhill, Ontario.
L3T 1L3

Attention: Mr. Narciso Mazzon

Dear Mr. Narciso:

Re: Observatory Hill Lot #116
(Mineral Marks on Maple Cherry
Kitchen Doors)

With reference to the above mentioned kitchen we understand that many of the doors have dark marks appearing in them. The door we are referring to is Number 1 Common White Solid Maple. There is a tendency for this species to have these mineral marks. These are hardly detectable in the white or unfinished state yet appear when the doors are finished. This is not defective product but rather is an acceptable industry standard within the grade of lumber that we use and thus we cannot control its appearance.

Wood is a natural product and this is an inherent feature of this species.

If you have any questions or require any additional information, please contact immediately.

Sincerely yours,

PARIS KITCHENS, Div. of
THE SANDERSON-HAROLD COMPANY

L. Wolfman,
Sales manager.

The builder appears to accept the manufacturer's explanation for the defects, although not referring to them as defects. But we take the view that the wood is defective and, therefore, should be replaced. It is our

opinion that where some of the cupboard doors are free from these mineral marks, then the rest should also be free from them. It would be of little consequence if the marks were to appear on the inside of the doors, but we do not consider it good workmanship that they should be obvious from the outside, thereby impairing the aesthetic appearance of the cabinets. We, therefore, direct the Program to replace the 5 cabinet doors which are the subject of the Applicant's claim.

The remaining issue is addressed by the inspector in complaint No. 2 (Exhibit 5, tab 6). This involves the staircase in which certain sections are alleged to be a different colour than the rest. The complaint is adequately delineated in the photographs entered in evidence as Exhibits 7 (a), (b) and 10 (a) and (b). In this we are confronted by the same problem as arose in our consideration of the kitchen cabinet doors. There is no doubt that the oak railing which constitutes the staircase in certain sections bears a different colour or shade from the rest. That is obvious from the photographs and admitted by the builder. It is not unsightly, but it is not to be expected in a reasonably expensive house.

The builder's defence is simply that this is the best he can obtain from the manufacturer. That may be so. But in our view, it is surely the builder's responsibility to match up as closely as possible, the various pieces which are designed to comprise the staircase. Mr. Narciso Mazzon giving evidence on behalf of the builder said it is impossible to get the same colour and he had changed a couple of pieces of railing before de Pinho moved in. Mr. Irvine on behalf of the Program has pointed out in his report that, "the colour variance is due strictly to the wood grain and veneer finish and is beyond the control of the builder or manufacturer". We do not accept that as a categorical denial of either the manufacturer's ability to supply or the builder's obligation to match the woods involved in the construction of the handrail.

We appreciate that with the number of new homes being built and the demand on the supplier, it is most difficult to accommodate that market. On the other hand, where there are no standards set either by the manufacturer or builder or the Ontario New Home Warranty Program on the quality of certain items such as the aesthetic appearance of woods, then that must be determined by this Tribunal in order to attempt to protect the consumer.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim as it pertains to Items 1 and 2 of the conciliation report. The balance of the claim is hereby disallowed.

MR. AND MRS. CHARLES du TOIT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
D.H. MACFARLANE, Member

APPEARANCES:

MR. AND MRS. C. du TOIT,
appearing on their own behalf

STEVEN L. WESFIELD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 February 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Charles and Diane du Toit took possession of their new house in March, 1986. On August 8th, 1986, they requested conciliation relating to numerous defects and deficiencies still outstanding. An examination of the house carried out on September 12th, 1986, found that 16 items were covered under the warranty provided by the Ontario New Home Warranties Plan Act, and some 30 were not. Of these 30 complaints, 19 had been resolved prior to the inspection.

One of the items found under warranty related to the problem of splotches of mortar disfiguring the exterior brick walls. The Inspector for the Ontario New Home Warranty Program, Richard Parker in the Conciliation Report stated:

10. Exterior - Clean Brick Work: The builder is to take the necessary action to ensure that the brick is left in a neat and workmanlike manner.

By June, 1987 there were still several defects which the builder had failed to rectify and a second conciliation was requested by the Applicants. On June 25th, 1987, a further inspection was made by Mr. Parker. He found that three items were covered by the warranty and seven were not. Mr. Parker,

in his report of that date, states:

3. Exterior - Clean Brick Work: The builder is to continue with his cleaning of the brick work and also ensure that the extraneous voids in the mortar joints are filled in a neat and workmanlike manner.

The du Toits were not satisfied with the condition of the brick following the June 25th efforts and they asked for another inspection. On September 4th, 1987, they received a letter from the Regional Manager for the Program which states, "Mr. Richard Parker has re-inspected the brick work on your home and has reported that it has been completed in a good and workmanlike manner".

Mr. and Mrs. du Toit testified as to the condition of the brick and provided the Tribunal with 15 photographs (Exhibit 5) showing, close-up, the splotches of mortar on the brick. One of the pictures, taken from a slightly further distance, shows that on that portion of the rear wall, the mortar has been splashed over a fairly wide surface. Mr. du Toit, who testified that he had taken the photographs some ten days prior to the hearing, said that he had only photographed those areas which were readily accessible to him, but that the condition prevailed throughout the building.

According to the du Toit evidence, following the first Conciliation Report, the builder had attempted to clean the brick using a chemical spray, but that method had proved unsatisfactory. They said that while Mr. Parker was making the inspection on June 25th, two of the builder's employees were at the premises, ostensibly for the purpose of cleaning the brick and filling in the mortar joints. It was their evidence that the workers were there for a short period of time - a few hours at most, and that little or no effort was made to clean the brick. According to their testimony, this was the last time that the builder attempted to correct the problem.

Evidence on behalf of the Program was given by Carlo Tozzi and Nick Vrbos, both employees of the builder, Royal Park Estate, and the aforementioned Richard Parker.

Mr. Tozzi testified that he was present at the du Toit home on June 25th, 1987 and that he saw workers at the house with wire brushes and ladders. He had not returned to inspect the house since that date.

Mr. Vrbos, who is the builder's superintendent, testified that one could expect that there will be some traces of mortar on brick work and that it would be impossible to clean the bricks perfectly, i.e. entirely. He said that the problems in this case had been exacerbated by the nature of the brick - it was rough textured and brown in colour. He said he had not inspected the house after October 1986.

When shown the photographs taken by Mr. du Toit, Mr. Vrbos said he could not believe that the house could have been left by the builders in the condition shown and could not believe that the photographs were taken only ten days previously.

Mr. Parker said that he had made a cursory inspection of the du Toit house in late August or early September, 1987 and had informally reported to his Regional Manager that the brick didn't look badly. He said that he intended to return to make a closer inspection at a later date and that he had not expected that the letter of September 4th, 1987 would issue based on his preliminary viewing. Mr. Parker did make a more thorough inspection on September 29th, 1987, at which time he too photographed the exterior of the house.

All 19 photographs (Exhibit 6) were taken from a much greater distance than those taken by Mr. du Toit, nevertheless, they do show tracings of mortar on the brick. Mr. Parker said the mortar is particularly noticeable on the west side and rear of the house and around the chimney. The photographs show mortar on the bricks on the front walls of the house as well. It was Mr. Parker's opinion, based on his years of experience, that although all the mortar had not been cleaned off the brick, it had been cleaned to an acceptable tolerance. He also said that he had seen houses in much worse condition and had received no complaints from their owners.

The Tribunal has no reason not to believe Mr. du Toit's testimony that he took the photographs of his house just recently. We do find it hard to understand why the builder did not immediately check the remedial work done to correct the problems. Mr. Vrbos seemed so surprised by what he saw in the photographs that he concluded that the pictures filed by Mr. du Toit must have been taken prior to June 25th, 1987, before further remedial work had been carried out.

The Tribunal acknowledges that cleaning the brick by hand is tedious work and that it is not reasonable to expect that all the mortar on the brick can be removed. The Tribunal

points out, however, that if the bricklaying had been done carefully, given the nature of the brick, and in a good and workmanlike manner in the first place, the builder would not now be faced with the problem. Mr. Vrbos seemed genuinely surprised at what he saw in the photographs. He clearly expected something better. The Tribunal expects something better as well. The remedial work to date is not of an acceptable standard as provided in the Ontario New Home Warranties Plan Act.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim and to remedy the defective brick work in a good and workmanlike manner by removing the mortar droppings, paying particular attention to those areas on the front, rear and west walls and the area around the chimney.

572309 ONTARIO LIMITED
(GREEN VALLEY HOMES LIMITED)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

HARRY SEGAL, President, 572309 Ontario Limited

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 5 April 1988

Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal dated November 16th, 1987, the Ontario New Home Warranty Program proposed to refuse to renew the registration of 572309 Ontario Limited operating as Green Valley Homes. Although there were some five allegations referring to breaches of warranty, breaches of terms and conditions and breaches of the Ontario New Home Warranties Plan Act, the main allegation against the company is that it failed to reimburse the Program in the amount of \$3,478.25, of which \$1,000 represents a conciliation fee. The Program incurred these costs when the company failed to comply with Conciliation Reports of the Program.

The Applicant corporation, 572309 Ontario Limited, was incorporated in late 1983 and was first registered with the Program in March 1984. The registration has been renewed several times. The last application for renewal was in April 1987. This application was not fully completed nor were supporting documents filed. It appears that the Applicant has registered some 45 homes to date. The deficiencies which were corrected by the Program relate to three homes in Thornhill. All deficiencies were reported by the owners within the first year of possession.

From the documentation, it appears that the majority of the items to be replaced or repaired, while no doubt a source of aggravation to the owners, were of a relatively minor

nature. The one exception was the replacement of a garage floor which cost over \$1,000.

Evidence on behalf of the Program was given by John Reid, the conciliator who inspected the three homes after the Program received the complaints and Birute Bourne, the claims co-ordinator who testified as to the steps taken by the Program first to rectify the problems and then to get reimbursement from the Applicant.

Testimony on behalf of the Applicant was given by Roy Segal, son of the President of the company and its construction foreman.

The evidence shows that during the first inspections of the three homes either Roy Segal or his father Harry Segal were in attendance. Following the inspection of the Rosen home, Mr. Reid initially determined that some 22 items were under warranty, while 25 were not. With respect to the Finklestein property which is next door to the Rosen home, Mr. Reid found 12 items under warranty and 8 not. One item was covered by the warranty in the Kay home and 12 were not. Subsequently several other items were found not to be warrantable.

Roy Segal testified that the Applicant was prepared to indemnify the Program for those items which in his opinion were covered by the warranty. (The Applicant had already made some payment). He said, however, that he could see no reason why the Applicant should pay for items which he believed should not be covered. For example, he stated that the loose bricks in the porch pillar on the Rosen property were the result of a moving van hitting the post; that some ceramic tiles had been broken because a heavy pan had fallen on them; that some of the defects had been caused either by normal use of the property by the owners in the first year or by other action taken by the owners. He stated that the Rosen's and Finklestein's had banded together to get back at the builder because they were unhappy with the company's response to their problems. He also questioned whether cash settlements with the owners were actually used to correct the defects.

Mr. Segal said he had not raised all these points of contention with Mr. Reid during the inspection because he did not know what was being considered; that he had not spoken with Mr. Reid after the Conciliation Reports were received; and had not informed the Program in writing of the company's objections. The Segal's said they had often spoken with Mr.

Lowood, the former director of operations about their concerns. They said they had not written because they believed there was no point in so doing.

It is clear to the Tribunal from the comments made by both Segals that they have no use for the Program and little respect for its employees. It is also clear that the relationship between the builder and the homeowners, particularly Rosen and Finklestein, was very strained. This situation may well have coloured the Segal's perspective of the matters in issue.

The Segal evidence as to their discussions with Mr. Lowood was very vague. The Segals had more than ample time to convey their objections in writing to the Program after receiving the Conciliation Reports. They chose not to do so. They also had more than ample time to correct most of the defects, which individually were of a simple nature and at far less cost to them than the final billing. Again they chose not to do so. In the Tribunal's opinion, the Segals do not comprehend how the Program works, and consequently they chose to ignore not only the Program, but also the legislation and the terms and conditions of their registration. This they cannot do and continue their registration.

The Tribunal is satisfied on the evidence before it that there were breaches of warranty, that the amounts claimed by the Program were paid to the contractor to rectify warrantable deficiencies and that the Program is entitled to be indemnified by the Applicant for this expenditure. The Tribunal is also satisfied that the administrative costs incurred by the Program and the conciliation fee of \$1,000 should be paid by the Applicant.

In argument, counsel for the Program stated that the applicant is not the worst builder registered by the Program or before this Tribunal. This is no doubt true, but the Tribunal cannot countenance a determined disregard of a builder's obligations under the Ontario New Home Warranties Plan Act. A builder cannot substitute his own opinion of what is required for the requirements of the legislation.

In reviewing the notice letter to the builder, the Tribunal notes that only "if there is a legitimate reason why any item cannot be completed within the time specified", is the builder obliged to notify the Program in writing prior to the expiry date. It may be appropriate also to advise builders that if there are any objections to the Conciliation Reports, such objections must also be made in writing within the same period.

In conclusion, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal unless within 30 days of the issue of the Decision and Order the Program is fully indemnified in the amount of \$3,478.25 and a completed application for renewal is filed with the Program.

REGINALD HEASMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
D.H. MACFARLANE, Member

APPEARANCES:

REGINALD HEASMAN, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF 18 March 1988 and
HEARING: 8 April 1988

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing to review the decision of the Ontario New Home Warranty Program to disallow the claim made by Reginald Heasman in respect of his home located at 1674 Trinity Court in Sarnia, Ontario.

Mr. Heasman took occupancy of his home on June 22nd, 1984. The home was built pursuant to a construction contract between Mr. and Mrs. Heasman and Gary Eddie Construction Limited. Mr. Heasman originally wrote to the Program on September 8th, 1984, enclosing a list of twelve deficiencies and requesting an inspection by the Program.

Around the same time, the builder of the home commenced an action under the Construction Lien Act in the Supreme Court of Ontario against the Heasmans claiming, inter alia, payment of some \$26,000 on account of materials and services supplied to the Heasmans. Mr. and Mrs. Heasman entered a defence and counterclaim in the Supreme Court action claiming damages of \$65,000 in respect of deficiencies and over-charges. A list of 85 deficiencies was delivered to the builder in support of their counterclaim. A copy of this second and much more extensive list of deficiencies was also provided to the Program in November, 1984.

Conciliation inspections took place on December 17th, 1984 and March 15th, 1984, with the builder and Mr. Heasman present. As a result of the conciliation process, many of the 85 items were either deleted from the claim, rectified by the builder, or otherwise settled. Mr. Heasman filed a formal proof of claim with the Program in February, 1987, in respect of 21 remaining deficiency claims. By a decision dated March 26th, 1987, the Program allowed 10 of the 21 items and compensated Mr. Heasman in the total amount of \$2,943 in respect thereof. The Program disallowed the claim in respect of the remaining 11 items.

By letter dated April 6th, 1987, Mr. Heasman requested a hearing before this Tribunal to review the Program's decision in respect of those 11 items.

This matter first came before the Tribunal for a hearing on August 25th, 1987. At the time, the Tribunal made a ruling adjourning the hearing sine die pending the outcome of the Supreme Court action in order to avoid a multiplicity of proceedings and the possibility of conflicting findings since all but two, or possibly three, items of the claim were also the subject matter of the Supreme Court action.

On January 9th, 1988, Mr. Heasman wrote to the Tribunal dealing with the 11 items in detail in an attempt to distinguish these items from the claims made in the Supreme Court action. As a result of that letter, the Chairman of the Tribunal formed the opinion that the hearing should proceed and a date for the resumption of the hearing was set. The Program took exception to the ruling by the Tribunal bringing the matter back on for a hearing notwithstanding that the Supreme Court action had not yet been tried. The Program brought an application before the Divisional Court seeking to quash the Tribunal's ruling. The Program also brought a motion before the Divisional Court seeking a stay of the hearing before the Tribunal pending a decision on the application to quash. The Divisional Court heard the motion on March 15th, 1988 and dismissed the application to stay. Part of the reasons endorsed on the Divisional Court record read as follows:

However, the respondent Reginald Heasman has undertaken not to include any of the claims presented to and dealt with by the Program, which claims are now the subject of his appeal to the Tribunal, as part of the Mechanics Lien action and in fact has withdrawn such claims from his counterclaim. Therefore there will be no duplication of proceedings.

The matter then came on before this panel for hearing on March 18th, 1988 and April 8th, 1988, respectively at which time the Tribunal heard evidence in respect of the eleven outstanding claims that are hereinafter dealt with. Mr. Heasman filed as Exhibit 12 a binder setting forth his submissions in respect of these eleven items. The headings which follow are taken from those submissions.

1. Hole for Laundry Hose

Mr. Heasman's initial complaint was that this was a roughcut and unfinished hole in the plasterboard. The Program found that this was a valid complaint and required the builder to install a plywood cover. The Program considered this to be carried out satisfactorily. In Mr. Heasman's formal proof of claim dated February 17th, 1987, the complaint set forth is "unsightly finish to a makeshift remedy". At the hearing before the Tribunal, Mr. Heasman complained about the location of the standing drainpipe in the stud wall. He is concerned about the possibility that, if the drain becomes plugged, the cavity wall would fill with water. He also submits that the trap and clean out plug are not accessible contrary to the requirements of the Ontario Plumbing Code, section 4.3.1. Mr. Heasman asked the Tribunal to require the Program to move the standpipe from inside the wall to outside of the wall.

With respect to this item, Mr. Lloyd Hagen, one of the Program inspectors, testified that no complaint was previously made to him regarding the location of the standpipe in the wall. Mr. Hagen inspected the Heasman home on three occasions. He further testified in his opinion, the location of the standpipe within the wall cavity was not a breach of the Ontario Building Code nor a major structural defect. He testified that there were three acceptable methods of installing such standpipe, namely, inside a cavity wall, outside the wall or over the lip of the laundry tub. He stated that one advantage of locating the standpipe within the wall is the maximization of clear space within the laundry room. Block-ups of drains from automatic washers were, he stated, unlikely to occur since the water is flushed away under pressure. With respect to the section of the Plumbing Code referred to by Mr. Heasman, Mr. Hagen pointed out that the section deals with accessibility of fixtures, not traps. The Plumbing Code, he said, does allow certain traps to be concealed, for example, bathtub traps. Mr. John Schnarr, another Program inspector who has inspected the home, agreed that it was proper to install the standpipe in the wall.

The Tribunal accepts the submission of counsel for the Program, that no complaint was made by Mr. Heasman as to the location of the standpipe in the wall cavity within the one year warranty period. Even if the complaint had been made within the one year period, based upon the evidence presented, the Tribunal is unable to find a breach of any of the warranties set forth in section 13(1) of the Act. The Tribunal further finds that this item of complaint does not constitute a major structural defect as that term is defined in Regulation 726. Finally the Tribunal accepts the submission of counsel for the Program that any claim under section 14(c) of the Act, that is, one arising out of a major structural defect, must be based upon actual damage suffered by the claimant. No actual damage has been suffered here by Mr. Heasman. The complaint is as to possibility of damage occurring in the future in the event that the standpipe becomes plugged and the cavity wall fills with water. The Tribunal accepts the evidence of the Program inspector that this is unlikely to occur in any event. The Tribunal also agrees with the submission of counsel that section 14(c) does not require the Program to compensate for potential damage that might occur in future.

This claim is therefore disallowed.

2. Rise at Front Steps

Mr. Heasman claims that the rise of the step in question exceeds the maximum permitted by section 9.8.3.2 of the Ontario Building Code (the "O.B.C.") The step leads from the front entrance hall to the concrete porch. Mr. Heasman also submits that the step is difficult to traverse and potentially hazardous, particularly for elderly or infirm persons.

The Program inspector measured the rise and found that there was substantial compliance with the requirements of the O.B.C. Mr. Hagen measured to the "nosing" or protrusion of the step, rather than to the highest point of the step. Mr. Heasman measured to the highest point which resulted in a measurement exceeding the O.B.C. maximum. Based upon the evidence, the Tribunal finds that the Program's method of measurement is a reasonable one and that the step construction substantially meets the requirements of section 9.8.3.2 of the O.B.C. The construction of the entranceway and front step are such that they are somewhat awkward to traverse, somewhat similar to crossing through a patio door entrance. However, the Tribunal is not satisfied that there is a breach of any of the section 13(1) warranties and accordingly disallows this claim.

3. Window Well Drainage

Mr. Heasman submits that adequate drainage for the window wells has not been provided. He testified that leakage at the corners of some of the basement windows has occurred on at least two occasions. This leakage is also referred to by Mr. Heasman in respect of Item 5 of his claim which shall be dealt with later in these reasons. No evidence of water ponding in the window wells was presented to the Tribunal. Mr. Hagen inspected the window wells and found that there was a mixture of gravel and loam in the well. There was no moisture present during any of his inspections. Mr. Hagen confirmed that there was evidence of minor staining on the internal concrete wall from the corner of the window frame. However, this was not, in his view, the result of inadequate drainage in the well. In Mr. Hagens' opinion, there is adequate window well drainage. Mr. Schnarr agreed with Mr. Hagen and testified that the staining on the wall could not be traced to any failure of the window wells to drain. The Tribunal accepts the evidence of the Program inspectors and disallows this claim.

4. Front Door Dented

The front door is a steel clad insulated door. The dent in question is at eye level on the door. Mr. Heasman testified that the door was dented prior to the Heasmans' occupancy date. The Tribunal notes that the dent is referred to in Mr. Heasman's initial letter to the Program dated September 8th, 1984. The Program takes the position that the origin of the dent is unknown and has not been proved by the owner to the satisfaction of the Program. The Tribunal is, however, in the absence of any evidence to the contrary, prepared to accept Mr. Heasman's evidence that the dent was there before he and his wife took possession of the home. The Program is directed to repair the dent or alternatively to compensate the claimant for the reasonable cost of such repair.

5. Basement Windows

Mr. Heasman claims that there is a gap between the basement window jambs and basement walls of about 1/2" in width. He also complains that the vapour barrier does not extend right up to the window jamb. The photographs filed as exhibits at the hearing before the Tribunal disclose the presence of the gap referred to. The presence of some water stains emanating from the corners of the windows suggests that water has leaked through these gaps. In the Tribunal's view, this gap is not consistent with the good workmanship. The

Program is directed to fill the gap with insulation and to seal it by caulking around the window frame on the exterior, or alternatively to compensate the claimant for the reasonable cost of such work.

6. Fireplace Vapour Barrier

Mr. Heasman claims that no vapour barrier was installed to the right of the area over the fireplace mantle. The Program has not been able to inspect the area to determine whether or not the vapour barrier is there since such inspection requires the dismantling of the fireplace. On the basis of the evidence presented at this hearing, the Tribunal is unable to make a determination. The Program is directed to have an inspector reattend at the home in order to determine whether or not the vapour barrier is in place, provided that Mr. Heasman is to arrange for the dismantling of the fireplace at his own cost in order that the inspection can be carried out. In the event that the inspection reveals that the vapour barrier is not in place, the Program is to pay all costs incurred in dismantling the fireplace, installing the vapour barrier and reinstalling the fireplace, including any reasonable redecoration costs incurred as a result.

7. Basement Stairs Lighting

The complaint is that lighting in the basement stairwell is inadequate. There is no direct lighting outlet over the stairwell itself. The stairwell is an open stairwell and there are lights in the basement ceiling which provide some light to the stairs. One such light is located 2'9" to the left of the stairway and another light is 5'3" to the right thereof. Mr. Heasman agrees that these two basement fixtures provide adequate light to the bottom stairs, but complains that the top risers are in shadow (they are located above the level of the basement ceiling) and that the lack of light at the top of the stairs creates a potential hazard. Mr. Hagen confirms that the basement lights do not provide light to the top risers. Mr. Heasman also submits that the provisions of the O.B.C. require a lighting outlet directly above the stair. Section 9.35.2.4 of the Code requires all stairways to be lighted and, in particular, requires one lighting outlet with fixture for stairways with four or more risers in dwelling units. The Tribunal directs the Program to install a lighting outlet and fixture in the basement stairwell or, alternatively, to compensate the claimant for the reasonable cost thereof.

3. Garage/Laundry Door

The claimant submits that section 9.9.6.13 of the D.B.C. requires this exit door to swing outwards. It presently swings inward. It is clear, however, that section 9.9.6.9 of the Code permits exit doors not serving more than one dwelling unit to swing inward. The claim is therefore disallowed.

9. Brick Sills

The claim made within the one year warranty period was in respect of cracks and crumbling on the rollock brick sill around the base of the exterior masonry wall, particularly at the corners. Some repairs were carried out by the builder, however, the corners are again exhibiting signs of looseness and cracking. The Program has advised the Tribunal that it is prepared to fix the corners and the Tribunal accordingly directs the Program to carry out such repairs or to compensate the claimant for the reasonable costs thereof. The Program is also directed to install weep holes under the rollock brick sill or compensate the claimant for the reasonable cost of such installation.

As stated by Mr. Heasman in his letter dated January 4th, 1988 to the Tribunal Chairman, an entirely new complaint in respect of the sills was raised by him in his February 17th, 1987 list of claims. This new claim was made after the expiration of the initial one year warranty, and, accordingly Mr. Heasman can only succeed in respect of the new claim if he can demonstrate that it amounts to a major structural defect as that term is defined by Regulation 726 and if he can prove that he has suffered damages as a result of such defect. Essentially Mr. Heasman claims that the masonry wall is not properly supported. He claims that the entire masonry wall is sitting out too far on the brick sill. He suggests that the appropriate remedy is to rebuild the entire masonry wall. Mr. Heasman testified that, in his opinion, the wall is properly and adequately supported by the foundation. The definition of a major structural defect is set forth in Section 1(o) of Regulation 726 under the Act. In this instance, there is no evidence of a failure of any load-bearing wall or a material and adverse affect on the load-bearing function of any such wall, nor any material and adverse effect on the use of the home and, furthermore, there is no evidence of any damages suffered by Mr. Heasman to date. This part of the claim is therefore disallowed.

10. Basement Floor Drain

Mr. Heasman complains that the slope of the basement floor is inadequate to permit proper drainage to the drain. The Tribunal accepts the evidence of the Program inspector that the floor has a proper slope and that a greater slope is impractical as it would result in an unlevel floor that would not accommodate the placement of furniture, etc. This claim is disallowed.

11. Garage Floor Drain

Again the complaint is that the floor is not properly sloped to provide adequate drainage. Again the Tribunal accepts the evidence of the Program inspector that the slope is adequate and the claim is disallowed.

Counsel for the Program submitted that the Tribunal could not order corrective work or compensation to this claimant until the Supreme Court action is concluded since the claimant could potentially derive a benefit in that action. Section 14(2) of the Act provides that in assessing damages "any benefit, compensation or indemnity payable to the person or owner from any source" is to be taken into consideration. As Mr. Heasman has specifically undertaken to the Court not to pursue his counterclaim in respect of those items dealt with by the Tribunal, he would not be entitled to receive any benefit in respect of those items from the Supreme Court. In respect of the monies he is now withholding from the builder, no evidence has been lead to show that those funds or part thereof relate to the items considered by the Tribunal. In result the Tribunal does not in this instance consider it necessary to stay the operation of its decision and order pending the conclusion of the Supreme Court action.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant. The appeal had not been concluded at the time of this publication.

JOHN Q. CUSTOM HOMES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

RIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
K. WILLIAMSON, Member

PEARANCES:

A. BARILE, representing the Applicant

CHRISTINE SILVERSIDE, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 13 January 1988 Windsor

REASONS FOR DECISION AND ORDER

In his Proposal dated June 11th, 1987, the Registrar gives notice of his intention to revoke the registration of the applicant pursuant to Section 8(2) of the Ontario New Home Warranties Plan Act. His reasons are as follows:

1. The builder has failed to acknowledge or comply with the conciliation reports rendered by the Program.
2. The builder has failed to comply with several items to be warranted by the Warranty Program.
3. The builder has failed to respond to correspondence from the Program.
4. Contravention of subsection 3 of Section 7(2)(8) of the Regulations in failing to perform all obligations imposed on him under the Plan.

John Q. Custom Homes Ltd. is operated by Giovanni Maggioletto in Windsor, Ontario. The company had built a home for a Mrs. V. Ciaravino at 1261 Carriage Lane, Sandwich West of which she took possession on October 25th, 1985. The Program received her first correspondence and complaint on June 9th, 1986, and directed a copy of it to the builder. The complaints

included water leaks in the north wall of the basement, the main water shut off valve buried under the concrete apron of the driveway and several doors which did not properly fit.

On July 26th, 1986, the Program was advised in correspondence from Mrs. Ciaravino that although John Q. Custom Homes Ltd. has sent out a Mr. Mustar to appraise the situation, no action had been taken. As a result, she requested an inspection and conciliation and enclosed her payment of \$50.00 representing the conciliation fee. Her application for conciliation also included some new complaints, the most serious of which was poorly installed window wells.

An inspection was made by Mr. A. Truman on behalf of the Program on September 15th, 1986 and the report mailed to John Q. Custom Homes Ltd. on September 19th. It required the builder to repair the leaking basement and window wells. Three minor items had been repaired. With the report, the Program included a notice to the builder to commence the work within 14 days and complete it in 30 days.

Further correspondence was sent by the Program on January 5th, 1987 arranging a meeting with the builder on January 12th, 1987. Nothing came of this. The Program on February 2nd, 1987 advised the builder that because of his default, he was in breach of the warranty and the Program would carry out and complete the work. Estimates were received in the amount of \$276.00 for the basement wall, \$1,350.00 for the weeping tile and windows and \$418.00 for grading and replacing sod. The total cost of \$2,044.00 was paid by the owner to the contractor upon the work being completed. The Program then indemnified the owner and looked to the builder John Q. Custom Homes Ltd. and Mr. Quaggiotto for reimbursement, together with 15% administration charges of \$306.60. The builder, having failed to respond to the Program's correspondence of May 1st, 1987 containing its demands for indemnity, now appeals to this Tribunal against the Registrar's Proposal.

Without recounting the evidence, we might simply observe that it supports unequivocally the Proposal of the Registrar. We find as a fact that the builder failed to respond to the requests and demands of both the owner and the Program. Correspondence from the Program was largely ignored, little or no attempt was made by the builder to remedy the situation. He did not even attend personally at the residence but, instead sent a man who obviously was not competent to assess or address the complaints. That man was a Mr. Mustar whose sole talent according to his evidence appeared to be that

of a painter. Having failed to comply with the Program's conciliation report, the builder is in default under Section 8(2) of the Ontario New Home Warranties Plan Act. Having failed to reimburse the Program, the builder is in contravention of subsection 4 of Section 7(2)(8) of the Regulations.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal.

STEPHEN KALOTAI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

ROBERT BANIK, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 14 October 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicant's sole claim against the Ontario New Home Warranty Program (the "Program") relates to the brickwork on the front face of the house and side wall of the garage. The Applicant claims that the brickwork in these areas is defective and substandard. The Program's position is that the brickwork is of an average and acceptable standard. The claim is made pursuant to Section 13(1) of the Ontario New Home Warranties Plan Act (the "Act") and was made well within the one year warranty period.

All of the witnesses called by the Program admitted that there are some defects in the brickwork but, in essence, opined that the defects were minor and did not impact on the appearance of the home. The Applicant, of course, voiced a different opinion in this regard.

Both the Applicant and the Program submitted photographs of the brickwork and it was on this evidence that the Tribunal placed the most reliance.

In the Tribunal's view, the brickwork is not of an acceptable standard and does have a significant negative impact on the appearance of the home, and accordingly, the Tribunal finds that the Applicant ought to succeed in his claim.

However, in considering the appropriate remedy in this case, the Tribunal is not prepared to order a complete rebrick of the areas in question. While there is a significant negative impact on the appearance of the home caused by the present state of the bricks in this case, it is not an impact of the same degree that the Tribunal observed in the Bohan case (reported at 1987 - 16 CRAT 138). The photographs indicate to the Tribunal the presence of excess mortar on the face of the bricks. The Tribunal is of the view that a proper clean-up of the bricks and mortar joints will improve the appearance of the home significantly. As well, the chipped brick that appears in a number of the photographs is to be replaced or repaired. The Tribunal further requires that all of this work be carried out under the direct on-site supervision of a Program inspector to insure that the work is properly carried out.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal allows the claim.

BRIAN KRIST

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:

BRIAN KRIST, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 10 August 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Brian Krist purchased a home on Antelope Crescent, Mississauga on June 18th, 1986, which was being built by Major's Way Development Limited. The contract called for possession on September 17th, 1986 and it was agreed by the parties that he received possession on that date. Unfortunately, no Certificate of Possession was entered by either of the parties in evidence.

When the transaction closed, however, there were certain items still to be finished by the builder which became the subject of a complaint to the Ontario New Home Warranty Program on May 8th, 1987 by Mr. Krist. This list was entered as Exhibit 3, Tab 1 of the Program's documents and constitutes a series of 9 uncompleted items and 10 which required repair.

It appears from the evidence that the Program attempted to have much of the work completed, but on November 5th, 1987 Mr. Krist submitted a list of what he termed "items in dispute". Mr. P.M. Poirier, an inspector for the Program attended at the premises on December 10th, 1987 and in his Report dated January 13th, 1988 addressed the complaints of Mr. Krist.

In Schedule "A(1)" found at Tab 3 of Exhibit 3, the inspector appears to agree that the priming of all the interior walls had not been completed and the front hall entrance,

closets and attic hatch which were warrantable, remained to be done. We hereby direct the Program to complete this work.

The second complaint involved a mahogany door on the entrance to the cold room. We note that the contract calls for all doors to be mahogany. The builder, however, points out that a mahogany door in the cold room would warp, and it was not intended that one be placed there. Mr. Poirier points out that the builder had placed a hardwood masonite door on the cold room which he had sealed and that a mahogany door would be appropriate.

It is not the purpose of this Tribunal to determine the intentions of the parties when executing their contract and we, therefore, leave this matter to be decided between the applicant and his builder.

We find that Item 4, Schedule "A(1)" is warrantable and hereby direct the Program to effect the necessary repairs to the complaints in paragraph 4, subparagraphs (a), (b), (c) and (d), and also the repair necessary to satisfy Item 5.

We find that the request in paragraph 6 has been addressed by the Program and adequately repaired.

The deck stain in paragraph 7 should be completed and we hereby direct the Program to do so.

Turning to Schedule "A(2)" found at Tab 3 of Exhibit , we note there is a list of 13 items not covered under warranty. We accept the inspector's Report in toto concerning these complaints with the exception of Item 12. This involves the brickwork around the side of the house which is badly stained. The photographs entered in evidence by Mr. Krist clearly demonstrate badly stained brickwork; the reason for which is not clear. We therefore hereby direct the Program to have this stain removed from the affected area. All other items in Schedule "A(2)" are hereby disallowed.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to complete and repair the items in Schedule "A(1)" of Exhibit 3 being Items 1, 4 (a), (b), (c) and (d), 5 and 7; and Item 12 of Schedule "A(2)".

MR. AND MRS. MARIOS KYRIAKOU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

HARVEY J. ASH, representing the Applicants

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 13 May 1988

Toronto

REASONS FOR DECISION AND ORDER

This is an application against the disallowance of claim under Section 14(1)(a) of the Ontario New Home Warranties Plan Act.

Counsel for the Applicants and for the Program agreed upon a Statement of Facts which was filed with the Tribunal. This Statement indicated that while the property at 64 Virginia Avenue in East York was registered in the name of Peter Kyriakou, essentially the development of the property was a joint operation of Peter Kyriakou and his brother, Marios Kyriakou, one of the Applicants in these proceedings. For the purpose of this application, the Tribunal has treated references to Peter Kyriakou or to Marios Kyriakou as interchangeable.

The Statement of Facts indicated that the property at 64 Virginia Avenue was owned by Peter Kyriakou and that on June 11th, 1984, he entered into an agreement with Tom Partalis to construct a home on the lot for a price of \$67,000. While the contract was with Partalis, it appears that Partalis was not registered as a builder with the Program but was a principal of Pella Developments Inc., which was registered as a builder with the Program and with whom Peter Kyriakou had had a previously aborted sale transaction in respect to this particular property. It appears that the parties treated Pella Developments Inc. and Partalis as one and the same entity and

in fact, some of the payments made under the construction contract were paid to Pella and some were paid to Partalis. It was agreed that a total of \$60,000 under the contract was paid to Pella or Partalis. The amount paid, however, was not paid in accordance with the terms of the contract which provided for payments of \$10,000 upon completion of the basement, \$10,000 on completion of the roof, \$10,000 on completion of drywalling and the balance on completion of the contract. Had the Kyriakous adhered to this schedule of payment, the problem of completion of the construction might have been controlled and the matters giving rise to the claim before this Tribunal might have been resolved.

The Statement of Facts indicates that in the summer of 1985, Partalis informed the Applicants that he would not complete the contract. There is no indication that the work done to that point was not satisfactorily completed although there is reference to the fact that some electrical wiring in the kitchen had been cut and that certain fixtures had not yet been installed. No claim was made to the Program at that time and there is no indication that any efforts were made to assert any claim against Partalis or Pella during the summer or fall of 1985.

Instead, Peter Kyriakou entered into an Agreement of Purchase and Sale in October 1985 with respect to the sale of a fully constructed home at a sale price of \$143,800. Attached to that Agreement is a schedule of work to be completed, but no evidence was presented to the Tribunal as to whether the items called for in that Agreement of Purchase and Sale were related to the construction contract with Partalis or whether such items were uncompleted items, modifications to work previously done, or special items for the benefit of the purchaser.

In any event, the Statement of Facts indicates that the Applicants paid \$2,558.88 for building supplies and \$21,724.35 to contractors. Apparently a construction lien in the amount of \$4,499.25 was also paid. This construction lien was related to drywalling which presumably had been contracted by Partalis and which should have been paid for out of the monies previously paid to Partalis or Pella by the Kyriakous. The material filed with the Statement of Facts indicates that the last \$10,000 payment was made on July 24th, 1985, although there is a reference that that cheque was not honoured on its initial presentation and presumably was to cover the drywall installation related to the construction lien. Had the Kyriakous behaved with somewhat more caution, this item of loss might not have been incurred.

In order to complete the sale, the Applicants ascertained that they were required to become enrolled as vendors under the Ontario New Home Warranties Plan Act and did become so registered. The sale of 64 Virginia Avenue took place on December 6th, 1985. Again no complaint was made to the Warranty Program at that time with respect to Partalis or Pella. In fact no claim was initiated by the Kyriakous until July 9th, 1986. No explanation has been provided to the Tribunal for this delay although full knowledge of the supplemental costs incurred by the Kyriakous must have been known well before December 6th, 1985.

In order for the Applicants to succeed, their claim must come within the provisions of Section 14(1)(a) of the Act which provides:

- (1) Where,
 - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from...the vendor's failure to perform the contract

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The Applicants must therefore prove to the Tribunal that they have suffered financial loss from the failure of Partalis or Pella to perform the contract. There is no doubt that the Applicants have paid out more than \$67,000 as called for in the construction contract with Partalis, but do these amounts represent a financial loss resulting from the vendor's failure to perform the contract? Counsel for the Applicants requested the Tribunal to find as a fact that the Applicants had suffered a financial loss in that their profits on the sale in December 1985 were less than they would otherwise have been by reason of the financial outlay made by the Applicants. While loss of profits in a particular transaction, where the builder has been apprised of the fact that the contract is being entered into to construct a home for sale purposes, may constitute damages reasonably and directly flowing from the breach of contract, in this case, no evidence was tendered to

the Tribunal that such circumstances were included as an element of the building contract with Partalis. As indicated, moreover, had the Kyriakous strictly followed the terms of their building contract, no financial loss might have been experienced. While the Kyriakous had to spend additional sums to complete the construction in order to complete the sale in December 1985, these financial costs cannot be attributed strictly to the failure to perform the contract by the vendor (Partalis).

The Tribunal was referred to the decision of this Tribunal in the Sidney Simpson case, which was a decision released April 12th, 1988. In that decision, the Tribunal clearly held that Section 6(3) of the Regulations created a limitation on a claim under Section 14(1)(a) and that Section 6(3) provided that an applicant under Section 14(1)(a) could have resorted to the fund for damages in respect to the home "other than damages in respect of unfinished work". While this section of the Regulations was repealed in 1987, the Kyriakous' application is nevertheless governed by such section of the Regulation. If this Tribunal had determined that the Applicants had suffered a financial loss and that the financial loss was due to the vendor's failure to perform the contract, then it is the view of the Tribunal, it would have been unable to give relief to the Applicants because the nature of the damages as set out in the agreed Statement of Facts related to unfinished work and not to damages incurred by reason of the work done by the vendor (Partalis).

Before concluding, the Tribunal would also like to make a comment with respect to the procedure followed on this application. While the Tribunal is sympathetic to the attempts of counsel to expedite the process of the Tribunal by filing an Agreed Statement of Facts, it became evident in this hearing, that there were many questions which were left unanswered by the Statement of Facts and which might have assisted the Tribunal in determining whether in fact there had been a financial loss occasioned by Partalis' failure to perform the contract. The Tribunal can only deal with the material presented to it. In the result, based upon the Tribunal's assessment of the facts as presented in the Statement of Facts and in its interpretation of the effect of Section 6(3) of the Regulations relating to Section 14(1)(a) of the Act, and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

PETER AND URSULA McCORMACK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

PETER AND URSULA McCORMACK,
appearing on their own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 June 1988

London

REASONS FOR DECISION AND ORDER

Peter and Ursula McCormack contracted to purchase a new home under Offer to Purchase dated the 10th day of March, 1986, with a company known as 627564 Ontario Limited, carrying on business as Heritage Homes.

The contract called for the payment of \$143,000, but contained a Schedule "A" attached in which the purchasers were given a certain allowance which read as follows:

Flooring allowance of \$13.00 per square yard (including installation) will apply to kitchen, foyer and bath areas.

This provision is quoted here because it was the governing factor in the Program's decision to refuse the claim

Prior to taking possession on June 6th, 1986, the McCormacks attended at Nadalin Tile to choose the ceramic tile for the vestibule, main floor, bathroom and laundry room since they were given a credit for these in the Offer to Purchase. They also engaged Nadalin to install the tile; an arrangement which would under Section 13(2)(a) of the Act exempt this installation from the Warranty Program.

The evidence is that the tile was installed during th

atter part of May before the work was completed involving the modification of the floor beam. The owner offers the account of Nadalin Tile dated May 30th in corroboration of his evidence. The builder, however, has contended that the tile was installed after the modification and the subsequent cracks in the tile could not be attributed to anything the builder did involving the change in the stairwell.

However that may be, it is the contention of the owner now that the cracks in the ceramic tile shown in Exhibit 7 are the direct result of work required to be done by the builder and ordered by the Building Inspector to be completed before he could issue an Occupancy Permit. There are five main cracks in the tile floor extending for the most part through the tile, but not in the grouted joints.

According to the report of R.M. Pow Limited, Consulting Engineers, they are as follows:

1. Beginning at the closet side of the front entrance door extending to the stairway to the second floor and then turning and extending to the living room entrance.
2. From jamb to jamb in the ground floor washroom entrance door.
3. In line with the family room partition extending to the basement entrance door.
4. In line with the ground floor washroom partition wall extending across the hallway to the garage.
5. Approximately 40" from the south wall in the laundry room extending almost the full length of the laundry room.

The Program's position is that since the owner contracted to have this tile installed himself, he has brought himself outside the warranty provided by the Act and the claim is therefore denied. The issue before this Tribunal is simply whether the modifications done by the builder were the cause of or contributed to the cracking of the tile and the Applicant can be brought within the provisions of Section 14(1)(c) of the Ontario New Home Warranties Plan Act.

The Tribunal accepts the evidence of Mr. McCormack that the tile had been installed prior to the modification ordered by the Building Inspector. What effect, if any, this change in the beams had on the tile floor, therefore, is the only matter to be decided by this Tribunal.

The evidence of R.D. Peterman, a professional engineer is that it is highly unlikely the floor cracked as the result of the subsequent work. He stated unequivocally that cracks would have appeared almost immediately if any change had occurred in the flooring. The work was done during the last week of May and the first week of June, but no cracks appeared until November. This is corroborated by the Applicant himself and is reflected in his correspondence to the Nadalin Tile Company dated March 16th, 1987, and his letter reads as follows

Peter W. McCormack
568 Gauthier Drive
Tecumseh, Ontario
N8N 3R2

Mr. D. Nadalin
Nadalin Floor and Wall Coverings
235 Eugenie St. W.
Windsor, Ontario
N8X 2X7

Dear Mr. Nadalin:

The quarry tile that your company installed in my vestibule, main floor bath and laundry room have developed hair line cracks. Starting in the November of 1986, a crack formed in a parallel line one inch away from the tile grout. This is a clear indication that the problem lies with the manufacturing of the tile and not with the installation of the product.

Subsequent to this incident, additional cracks have developed. It should be noted that the cracks are not a result of the settling of the house, as the house does not settle in the middle of the winter. In any event, the cracks should have occurred in the tile grout, which is a more likely area for the cracks to

occur since the grout is a weaker area.
I trust that this matter will be dealt
with and corrected.

Sincerely,

"Peter W. McCormack" (signed)

"Ursula McCormack" (signed)

It must be noted, and it is significant, that Mr. McCormack made no reference at that time to the change in the supporting beams as the cause of the tile cracking which he now alleges to be the reason.

The report of Mr. Peterman employed by R.M. Pow Limited, Consulting Engineers on behalf of the Program, indicates a thorough investigation of the work done by the builder to comply with the Building Code as it relates to the cracked tiles.

The report, in part, reads at page 2:

The appearance of the cracks indicate a shattering of the top surface of the crack in the ceramic tile due to the brittleness of the finish of the tile while the cracks which extend through the grouted joints are hairline and almost negligible. We further observed that the cracks all occur in slight depressions in the floor.

.....

If the ceramic floor was, in fact, in place at the time of this modification, it is very unlikely, in my opinion, that this floor could have been jacked upward to any significant degree based on the placement and existence of first floor partition walls. Furthermore, the crack in the tile in the laundry room is well past a second support line and discontinuity in the wood joist flooring and any displacements at the location of the basement stairway would not have been transmitted to the extent of the rear of the laundry room.

To the extent that driving the wood post in place with a sledge hammer would have resulted in vibrations of a significant nature to cause cracking, the above comments would apply in that the crack experienced in the laundry room is a significant distance away from the location of the post addition.

.....

Regarding the installation of a tile floor, it would be our comment that laying of ceramic tile floors in an epoxy bed on 1/4" underlay over 5/8" plywood flooring is commonly performed by many flooring contractors. However, this type of floor construction can crack and is not as successful as other construction systems used. There are many other reasons why the cracks could have occurred in this particular floor other than those related to any modification work which has been undertaken in the basement. We would note that the cracks observed in the tile floor are coincident with splices in the plywood sub floor and, therefore, may be a function of movement or shrinkage if the staggering of the joints in the 1/4" underlay have not been properly located.

In summary, since the application falls outside Section 13(1) of the Act and the claim is specifically excluded under Section 13(2)(a), it is incumbent upon Mr. McCormack to adduce sufficient evidence to persuade the Tribunal, the damage to the tile was the result of the builder's modification to the supporting beam. The weight of the evidence, however, in our view, does not support the claimant's contention. Mr. McCormack's letter of March 19th to Nadalin Tile reflects his belief that the tile was faulty and he expected the manufacturer to repair it. That brought him no result, and he has since raised another issue; but no cracks appeared in the tile until November - almost six months after the modification work had been completed.

The engineer's report and his evidence that the cause

ould be attributed to the builder's modification work was only remotely possible lead us to no conclusion other than that the cracks in the tile arose through some other agency. Under the circumstances, we also find that the claim does not fall within section 14(1)(c) since the damage to the tile did not result from a major structural defect and the claim must be denied.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. RAYMOND McDIARMID

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

MARK S. GROSSMAN, representing the Applicants

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 28 April 1988 Owen Sound

REASONS FOR DECISION AND ORDER

The Applicants, Raymond and Ethel McDiarmid were residing in Welland, Ontario during their initial discussions with a Mr. Frederick Peters, whom they had consulted about the construction of a new home.

They had purchased a lot in Markdale in 1984 and felt that in their years of retirement which were imminent they would prefer to live in that community. With that purpose in mind, they arranged with Peters to provide them with photographs of the type of homes he had available, apparently as agent for Viceroy Homes. They agreed on the "Hudson" model and entered into a contract with Peters on March 26th, 1985, which is Exhibit 38, tab 3.

The contract provided for Peters to build the revised Hudson model home for the price of \$45,000.00, but which on completion of the contract could only be termed as a shell, since the inside work and much of the outside was left to McDiarmid to complete.

Subsequently, since McDiarmid had obtained a firm offer on his house in Welland, he entered into another contract with Peters on May 20, 1985, Exhibit 38, tab 5, for additional work and the payment of a further \$16,000.00. This was termed an amendment to the contract of March 26th and we, therefore, view both contracts as one. This contract provided for much of the work left out of the original contract, but did not provide for a completed house.

Peters then on June 4th, 1985, applied for a building permit in the name of McDiarmid, as his agent, which was paid for by a cheque given by McDiarmid to Peters. Peters was not registered as a builder under the Program and, therefore, could not apply for the permit in his own name. As McDiarmid explained in his evidence, the purpose of the March 26th contract was to enable him to take advantage of the rebate program of 5% and then get the blueprint of the house which he received on August 1st.

Peters began the construction of the house and there seemed to be no difficulties between the parties until July, when Peters asked for more money and McDiarmid wanted another bathroom included in the basement. This friction was compounded by the local building inspector coming into the picture demanding certain changes. The letter of R.E. Booth, Chief Building Official for Markdale is reproduced since it brought McDiarmid and Peters to an impasse. The letter dated the 19th day of July, 1985 reads as follows:

19 July 1985

Mr. Ray McDiarmid
18 Crescent Drive
Welland, Ontario
L3B-2W7

Dear Sir:

Thank you for building in Markdale, we are looking forward to welcoming your family into the community. As you know, the construction is nearing completion and in my opinion as the Building Official, the contractor is doing an excellent job.

The purpose of this letter, in conjunction with the above, is to advise you of a minor problem in design and a possible misunderstanding in intent.

On July 4/85 I received, from your agent Mr. Peters, a copy of the change regarding the exit, entrance to the basement area, signed by yourself and Mrs. McDiarmid. At the time, I expressed some concern that the change may not conform to the Building Code, to both your agent and the contractor. During an inspection, as

of to-day (sic), I find that there are some additional changes which will be required since the exit from the basement is not in accordance with Section 9, 10, 14, 17.

Changes required are;

- 1) The stairway is required to be ENCLOSED.
- 2) The DOORWAY is required to be at the GARAGE LEVEL.
- 3) The SILL of the doorway is required to be NOT LESS THAN 150mm (5.91") above the garage floor.
- 4) The DOOR is required to be fitted with a SELF-ENCLOSING DEVICE and shall have tight fitting weather stripping to provide for an effective barrier against the passage of gas and exhaust fumes.

As to the possible misunderstanding (sic) of intent, Mr. Fred Peters (your agent) has on several occasions assured me that you have assured him the basement area is to be used for no other purpose than storage. That being the case, the garage stairway could be considered as an adequate exit from the basement, however, during to-day's (sic) inspection I observed that there was a roughed-in bathroom facility in the south western corner of the basement. This does not indicate to me that the area is to be used as strictly "storage" and there-in (sic) lies the misunderstanding (sic).

If your intent is to use the space for other than storage, now or in the future, please make arrangements with your agent and/or contractor to provide a conforming EXIT to the basement. If, however, you intend to use it only for storage, please advise me of this in writing and make arrangements to have the bathroom facilities removed.

Thank-you for your anticipated attention to this matter. I would like to make it clear that the changes on page one of this letter are required in any event and I sincerely hope that you realise (sic) that all of the above is for the safety of you, your family and anyone who would subsequently own the house.

Yours truly,

R.E. Booth
Chief Building Official
Village of Markdale

cc Mr. Fred Peters (agent)
Mr. John Boyce (contractor)

Originally McDiarmid wanted stairs to the basement through the garage and then requested Peters to rough in a bathroom in the basement. After receiving the letter from the building inspector, McDiarmid then blocked up the wall to the basement. Mr. Peters at that point walked off the job. In the meantime since McDiarmid could not have the fireplace he originally wanted, he contracted Dan Rappky of Northern Heating and Ventilation to supply and install a heat recovery ventilation system, a smokepipe and a wood-electric combination furnace. Rappky was working there when Peters left the job.

McDiarmid and Peters, however, appeared to reconcile their differences and in August 1985 entered into a final contract. This document set out certain work to be completed by Peters and excepts thereout specific work to be done by McDiarmid for which he received a credit of \$1,400.00.

In summation, it is clear to the Tribunal that none of the contracts between the parties either on their own or in their totality contemplated a completed house. In fact, McDiarmid sealed up the drywall, supplied all the lighting fixtures, the staircase, vanities and kitchen cupboards. He contracted out to Rappky the work of installing the ventilation and heating system: certain caulking work, trim, floor coverings and installation of the front porch were to be completed by McDiarmid. He offered in evidence a ten page list of items he had completed and Peters had allegedly left incomplete. His cost to date appears to be \$12,414.80 which includes a charge of \$4,320.00 for diminished living room space decreased by 72 sq. ft.

We find on the evidence that Peters was not a builder as defined under Section 1(a) of the Ontario New Home Warranties Plan Act because he was not "a person who undertakes the performance of all the work and the supply of all the materials necessary to construct a completed home, whether for the purpose of sale by himself, or under a contract with a vendor or owner." We also find, as a result, that this was not a construction contract within the meaning of Section 1, subsection (e) of Regulation of 726 because Peters cannot be held out to be a builder. For McDiarmid, therefore, to succeed in his claim he must convince the Tribunal he falls within Section 14 of the Act and that Peters was in fact a vendor as defined by Section 1(n). Vendor means "a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner."

The issue then simply is whether Peters undertook to sell a home to the McDiarmids because the parties do not fall within the latter part of the definition of vendor. Peters was not a builder constructing a home for the owner.

Although McDiarmid had settled upon the type of house he wished constructed (a revised Hudson model), we cannot find that Peters was engaged to sell this unit to him. The contracts indicate certain work designated to Peters with the remainder left to McDiarmid who in a sense retained control as a contractor with the work being done in a piecemeal fashion by Peters. On all the evidence, therefore, the Tribunal must reject the claims of Mr. and Mrs. McDiarmid and sustain the Decision of the Program.

In conclusion, however, it is interesting if not unfortunate to note that the parties had never discussed the application of the Ontario New Home Warranties Plan to the project. It does not appear that either of the parties had contemplated registration under the Act, although Peters could have been enrolled in the plan under Gary Douy, a builder with whom he was associated. But it is clear from the initial contract that Peters was neither building a home under a construction contract nor selling a home and their arrangement was not within the scope of the Ontario New Home Warranties Plan.

Therefore, by virtue of the authority vested in it under section 16, subsection 3, of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicants. The appeal was subsequently withdrawn.

HOWARD MARTIN HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

RICHARD B. STRYPE, representing the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 22 June 1988

London

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar under the Ontario New Home Warranties Plan Act to refuse to renew the registration of the Applicant on the basis that a company H.L. Martin Drywall and Construction Ltd., the principals of which are the same as the principals of the Applicant failed to comply with the provisions of paragraph 4.4(2) of that latter company's Vendor/Builder Agreement of August 1984 in that such company failed diligently to perform its warranty obligations under the Act and failed to indemnify the Corporation from the loss sustained by the Corporation from the failure to do so and failed to provide the security requested by the Corporation; namely, the payment of \$10,239.60, plus the provision of security in the amount of \$2,000 based upon \$1,000 per unit intended to be constructed

The circumstances relating to the breach of warranty by H.L. Martin Drywall and Construction Limited arose out of the construction and sale of a home located at 65 Georgian Crescent, Kitchener, Ontario, possession of which was taken on December 20th, 1985. At that time, a Certificate of Completion and Possession was issued, identifying certain matters to be corrected and completed. Subsequently on August 25th, 1986, the purchasers wrote to the Program complaining of the non-rectification of many of the items in the Certificate, together with additional items relating to unsatisfactory construction. As a result of this complaint, an inspection of the property occurred on September 24th, 1986 and a Conciliation Report dated September 29th, 1986 was issued.

even items were identified. An inspector for the Program attended at the home on October 2nd, 1986 and found work in progress. On November 3rd, 1986, the Program received a notification from the homeowner that three items had not yet been completed: specifically, the defective brickwork which had not had all defective mortar removed and replaced; the parging which was still rough and exhibited poor workmanship; and the repair of the stove vent in the kitchen cabinets. Mr. Hagan, the Program's inspector reviewed these matters with the homeowner on April 8th, 1987, noting that the items referred to in the November 3rd, 1986 complaint were for the most part items which could not be completed during the winter.

On May 15th, 1987, the Program received a letter from the homeowner reiterating his complaint about the mortar, that it was soft and powdering and was continuing to deteriorate, as well as the parging. Mr. Hagan spoke to Mrs. Martin, an officer of H.L. Martin Drywall and Construction Ltd. and of the Applicant on May 21st, 1987 informing her in part of the contents of the letter of May 15th, 1987.

Counsel for the Applicant raised some concern about that part of the letter was read to Mrs. Martin. While Mr. Hagan could not recall the portion, it would seem that at least the portion of the letter dealing with the brickwork and parging and comments of the bricklayer must have been read inasmuch as Mrs. Martin in her evidence indicated that she had requested the name of the bricklayer who had made the comments and that Mr. Hagan refused to give the information to her. In that telephone conversation, there is conceded by both Mr. Hagan and Mrs. Martin that she indicated at least that H.L. Martin Drywall and Construction Ltd. had not renewed its registration with the Program and that such Company was no longer building houses. Mr. Hagan testified that he informed Mrs. Martin that the Program would seek recovery for any work done by the Program in effecting repairs. Notice of breach of warranty was forwarded by the Program under date of May 27th, 1987 and was acknowledged as having been received on June 8th, 1987. This notice was sent after a visual inspection of the property on May 27th, 1987.

On June 1st, 1987, Mr. Hagan accompanied by a representative of New Look Restoration Ltd. attended at the property and as a result, a quotation for spot pointing all soft mortar joints where necessary and coating of the foundation was issued by New Look Restoration Ltd. in the amount of \$8,904.00. On June 3rd, 1987, Mr. Hagan telephoned Mrs. Martin to inform her of the amount to be expended by the

Program, including a 15% administration charge. On June 5th, 1987, Mrs. Martin contacted Mr. Hagan about appealing the costs to be charged to the Company and indicated that she would call back in the week of June 8th, 1987.

She did not call and in her evidence, Mrs. Martin explained that she thought there was no purpose in calling because it was a "fait accompli". The settlement with the homeowner was concluded on July 7th, 1987 and M.L. Drywall and Construction Ltd. was invoiced by the Program on June 26th, 1987 for the sum of \$10,239.60, representing the \$8,904.00 plus the 15% administration charge. No payment of this invoice has been made and the Program has made it a condition of renewal of the Applicant's registration that this amount be paid, together with the posting of additional security.

The most impressive witness regarding the quality of the workmanship with respect to the mortar was the Applicant's bricklayer, Mr. Laugalys, an experienced bricklayer who was called on by the Martin's to attempt to correct the mortar problem. He testified that there was an obvious problem with the mortar but without taking a core sample, he could not be sure whether the mortar was bonding satisfactorily or not. He described the original work as mediocre and informed the Tribunal that he had recommended to the Martin's that the brick be removed and re-installed. Notwithstanding, he was instructed to patch which he did by testing with a masonry hammer and as defective areas were found, he chipped out and replaced the mortar. He characterized his work as trying to put a band-aid on the work and in the view of the Tribunal, the result probably would not satisfy the homeowner, which in fact is indicated by the subsequent complaints of the homeowner.

The Tribunal also notes that although Mr. and Mrs. Martin thought all work in the Conciliation Report was completed by October 4th, 1987, and in fact paid Mr. Laugalys' invoice dated October 6th, 1987 of some \$1,383.00, Mr. Martin did not examine the work or contact the homeowners to ascertain whether they were satisfied and Mrs. Martin, although she did a visual inspection and thought it satisfactory, did not contact the homeowners or request them to indicate their satisfaction or otherwise, nor did she inform the Program that the work had been completed. Under the circumstances, the Tribunal finds as a fact that H.L. Martin Drywall and Construction Ltd. failed diligently to perform its warranty obligations under its Vendor/Builder Agreement with the Program.

Counsel for the Program submitted that the aesthetics

of the brickwork is an integral element of the warranty under Section 13(1)(a) of the Act that the home is constructed in a workmanlike manner and referred the Tribunal to the decisions of this Tribunal in the case of Robert J. Bohan (1987 Summaries of Decisions - Vol. 16, p.138) and the case of Dan Vera (1987 Summaries of Decisions - Vol. 16, p. 183). In both of these cases, this Tribunal noted that while the brickwork may have been completed in accordance with the provisions of the Ontario Building Code and might permit the home to be fit for habitation, appearance is very much a part of construction in a workmanlike manner.

The Tribunal in the Dan Vera case stated at page 186:

...the problems revealed by the evidence in this case show not just poor workmanship, but outrageously dreadful workmanship. [The Tribunal] would be remiss in [its] duty to the consuming public of Ontario were [it] to decide that such a low standard of competence in the laying of bricks is acceptable or that the owners of new homes...should be forced to put up with such shoddiness or any kind of half-adequate partial rectification of the problem...

The Tribunal was impressed with Mr. Laugalys' comment that if an employee of his had done such an initial mortaring job, such employee would no longer be working for him. This Tribunal endorses the statements made by the Tribunal in the Bohan and Vera cases and regrets that the Program did not consider re-bricking as an alternative in light of the comments in the Conciliation Report, the subsequent complaints and the evidence presented at this hearing, particularly the evidence of Mr. Laugalys that, if he had gone over the house three times instead of only once, he might have been able to upgrade the mortar.

Having said this, the Tribunal is not entirely satisfied with the actions of the Program in this matter. After receipt of the homeowner's negative comments on November 3rd, 1986, the Program did not make any further inspection of the home until May 27th, 1987 and only after the further oral complaint of the homeowner on April 8th, 1987 and written complaint of May 15th, 1987; nor did the Program contact the builder during the period after receipt of the complaint on November 3rd, 1986 until May 21st, 1987 after receiving the

complaints referred to above. No satisfactory explanation of this delay was provided by Mr. Hagan and in view of the fact that the builder had previously responded to requests of the Program, it appears to the Tribunal that the Program behaved somewhat unfairly to the builder in not proceeding with more dispatch.

The Tribunal is not satisfied with the fact that the Program chose to obtain only one quotation for pointing the brickwork and did not consider the alternative of re-bricking. The Tribunal is, therefore, not satisfied that the Program obtained the correct quotation for rectifying the unworkmanlike construction of the home at 65 Georgian Crescent.

The Tribunal finds itself in the awkward position of trying to balance its duty to the public of Ontario with its obligation to treat fairly the Applicant in this instance. The Program has indicated that it is prepared to renew the registration of the Applicant if the Applicant reimburses the Program the amount paid out by the Program in the sum of \$10,239.60 and posts a \$1,000 bond for each unit to be constructed. Because of the actions of the Program in its dealings with the Martin's, the Tribunal is of the view that this amount is excessive, particularly when it was used for settlement purposes and not actually to effect repairs by the Program to the home. Under the circumstances, the Tribunal is of the opinion that the amount should be reduced to \$4,500.00, plus a 15% administrative charge of \$675.00 for a total of \$5,175.00.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act the Tribunal directs the Registrar to carry out his Proposal not to renew the registration of the Applicant subject to the proviso that, if the Applicant pays to the Ontario New Home Warranty Program the sum of \$5,175.00 and posts security in the form of a \$1,000 bond for each unit intended to be constructed then the Tribunal directs the Registrar to renew the registration of the Applicant

MR. AND MRS. LARRY MORTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

DAVID M. ROVAN, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 15 September 1988

Toronto

REASONS FOR DECISION AND ORDER

The issue in this case is whether the Mortons' are protected by the Ontario New Home Warranties Plan Act in their contract with Morgin Custom Builders Ltd. (hereinafter referred to as "Morgin") who by a contract dated March 27th, 1987, agreed "to build said house as per Colonial Homes (model Charlesborough) the plan that you have submitted to us." Attached to that contract is a Schedule A specifying the items covered in the contract. It is to be noted that only with respect to the plumbing and electrical work is labour to be supplied. Mr. Morton in his evidence informed the Tribunal that this was because he had clients who could supply these materials. He also bought the particular Colonial Homes re-engineered package which Mike Jones of Colonial Homes in his evidence indicated was a complete house enclosure. The package does not include trim, drywall or basement, all of which were included in Schedule A to the Mortons' agreement with Morgin. Mr. Morton indicated to the Tribunal that what he was contracting from Morgin was a "turnkey" operation; that is, a completed home.

Evidence was presented to the Tribunal that Morgin represented itself to be registered under the New Home Warranties Plan Act and, in fact, exacted a "registration fee" from the Mortons of \$500.00 which the Program is prepared to pay to the Mortons if this Tribunal rules in favour of the program. Evidence was given that Morgin was constructing several homes in the area and Mr. Jones of Colonial informed the Tribunal that Morgin offered to build homes for Colonial or

purchasers from Colonial. The original Building Permit tendered in evidence to the Tribunal was taken out by Morgin. Even though it was rather incomplete, it appears to have been accepted by the Municipal Building Department. All of these facts would appear to indicate that Morgin was contracting with the Mortons to sell them a home not previously occupied.

Schedule A to the Agreement has had a number of written deletions made to it - all of which in submissions by counsel for the Program would indicate a product much less than that of a completed home. In his cross-examination, Mr. Morton indicated that it was intended that all of the items specified in Schedule A would be provided by Morgin. It was only as the work progressed and Morgin was unable or unwilling to provide certain of the items that these were deleted and that this occurred close to the time when the Mortons finally discharged Morgin in October 1987.

The Program in its disallowance of the Mortons' claim did so on the basis that Morgin was not a "builder under Section 1(a) of the Act in that Morgin did not supply all the materials." This Tribunal is somewhat troubled by the definition of "builder" as contained in the Act because the Tribunal recognizes that current building practices in Ontario might remove many builders from this definition because either the owner is supplying some plumbing or electrical fixtures or some specialized installation such as marble flooring on the one hand or the owner may be acquiring a pre-engineered packaged building from a company such as Colonial or Viceroy of which Mr. Jones indicated there are approximately twenty such vendor companies in southern Ontario. Perhaps the Legislature should seriously look at revisions to this definition to deal either with the concept of a "builder" providing substantially all of the materials or the concept that a "completed home" means only the supplying of all things necessary to make a house habitable, but not necessarily all materials (such as cosmetic or non-essential features or alternative features like a "jacuzzi" instead of an ordinary tub.)

The Act does contemplate however that an owner may supply some materials because in Section 13(2)(a) of the Act, it expressly provides that the warranty under the Act does not extend to "defects in materials, design and workmanship supplied by the owner."

In the facts of this case, however, the Tribunal need not be unduly concerned with the definition of a "builder" because this Tribunal finds as a fact that Morgin is a "vendor as defined under Section 1 of the Act in that it agreed "[to sell] on [its] own behalf a home not previously occupied to a

wner...", because Morgin agreed to construct a completed home for Mr. and Mrs. Morton in essentially a "turnkey" arrangement, and the Mortons are "owners" as defined under the Act in that they were the persons who first acquired a home from their vendor Morgin for their occupancy.

The Tribunal has carefully considered the cases cited to it by counsel for the Program. In the Ronald Bond case, released March 22nd, 1988, there are a number of substantial differences in the facts. Bond obtained and paid for the Building Permit. The Mortons did not. Bond arranged for the basement excavation and pouring of the concrete foundation. The Mortons required Morgin to do this as part of a total home construction contract. The Tribunal in the Bond case found that Bond in fact was the general contractor arranging for component parts of the home to be constructed. Bond in fact exercised overall supervision. In the case before us, the Mortons contracted for a "turnkey" operation relying upon Morgin to act as general contractor and vendor of a home to them.

In the Raymond and Ethel McDiarmid case, released August 31st, 1988, the McDiarmids were going to build a Viceroy home on their lot, but unlike the Mortons who contracted with Morgin for the specific Colonial Home to be constructed in its entirety except for some plumbing and electrical fixtures which nevertheless were to be installed by Morgin, the McDiarmids maintained control over the whole project acting in effect as the general contractor and in some instances as a specific contractor: sealing up the drywall, supplying all lighting fixtures, staircase, vanities and kitchen cupboards, caulking, trim, floor coverings and front porch. Mr. McDiarmid also contracted out ventilation and heating to others. Moreover in the McDiarmid case, there was no consideration by any of the parties of the Ontario New Home Warranties Plan Act. In the Mortons' case, this was specifically addressed and in fact a fee was charged for registration of the project. In the view of this Tribunal, these facts clearly distinguish the Mortons' position from that of the McDiarmids.

By virtue of the authority vested in it under Section 6(3) of the Ontario Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim of the Applicants with respect to the work of the vendor Morgin Custom Builders Ltd., subject to any defects in material supplied by Colonial Homes Ltd. or plumbing fixtures supplied by the Applicants, provided that such claim shall only apply to work performed by Morgin prior to October 5th, 1987, the date upon which Morgin was discharged from the job site.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal had not been concluded at the time of this publication.

MR. AND MRS. G. PAIVA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
D.H. MACFARLANE, Member

APPEARANCES:

TERESINHA PAIVA, appearing on their behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 7 September 1988

Toronto

REASONS FOR DECISION AND ORDER

This was a claim made pursuant to Section 14 of the Ontario New Home Warranties Plan Act, (the "Act") in respect of Mr. and Mrs. Paiva's home at 35 Abbot Drive, Hamilton.

The claimants took possession of the home November 22nd, 1985. Some weeks after the family had moved in, they discovered that the shower in the lower level washroom leaked. There are several cracks in the grouting allowing water to pass through, saturate the drywall behind it and leak through to the unfinished basement. The builder appears to have used regular drywall behind the shower wall instead of the water resistant type required by the Ontario Building Code.

The cracking itself would appear to be the result of normal shrinkage of the wall boards and is not the result of defective workmanship or materials. The Tribunal would be prepared to find that the failure to use a water resistant wall board as required by the Ontario Building Code amounts to a breach of the warranty provided by Section 13(1)(a)(iii) of the Act. However, that warranty applies for a one year period only and in this case, the Program was not advised of the Paiva's claim until February 15th, 1988. The shower defects complained of do not relate to any load-bearing function and have not affected the use of the building and accordingly do not constitute major structural defects. The Tribunal is therefore unable to allow this claim.

The builder was made aware of the leakage in the shower soon after it was discovered and returned on three occasions to make repairs, however, the leakage continues. The Tribunal strongly suggests to the Program that it attempt to persuade the builder to return in order to correct the problem, including replacement of the substandard boards.

The second matter that is the subject of the Paiva's claim relates to the brick column at the corner of the front veranda. This is a load-bearing column which supports the roof overhang. There is a crack between the 9th and 10th brick courses and the column has shifted and twisted at the crack. The problem was first pointed out to Mr. and Mrs. Paiva by Mrs. Paiva's brother some months after the possession date. The crack appears to be the result of a hit by a motor vehicle or other object.

There is no evidence before the Tribunal as to who may have hit the column. More significantly, the problem was not reported to the Program within one year of the possession date and, therefore, the claim can only succeed if the defect falls within the definition of a major structural defect. The crack and shift in the column are not the result of a defect in workmanship or materials, but as far as we are able to ascertain based upon the evidence, result from a hit. The use of the Paiva home has not been adversely affected and the load bearing function of the column has not failed at this juncture (although there is at least a possibility of future failure). The claim cannot be allowed by the Tribunal.

In respect of both items, the claimants would undoubtedly have fared better had their claim been brought to the attention of the Program on or before November 22nd, 1986, the expiry date of the one year warranty. They were certainly aware of the defects well within that first year period and the defects were brought to the builder's attention within the first year. Notably Mr. and Mrs. Paiva attended at their solicitor's office some two weeks prior to the expiry of the first year warranty and, as a result of that meeting, the solicitor wrote to the builder's solicitors itemizing his clients' complaints. His November 6th, 1986 letter makes it clear that he was well aware that the warranty period was about to expire. Why he permitted the period to expire without preserving Mr. and Mrs. Paiva's rights by notifying the Program of their claims remains a mystery to this Tribunal. Had the solicitor simply sent a copy of his November 6th, 1986 letter to the Program, Mr. and Mrs. Paiva would be in a different position today.

The Tribunal sympathizes with these claimants since clearly they were unaware of the need to bring their claims directly to the attention of the Program within the first year after their possession date. Unfortunately, the Tribunal is powerless to assist them in the circumstances of this case.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

B.K. SHAH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
D.H. MACFARLANE, Member

APPEARANCES:

B.K. SHAH, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 September 1988

Toronto

REASONS FOR DECISION AND ORDER

The only claim which was unresolved before the Tribunal was with respect to the mouldy tarpaper in the basement area of the home. The homeowner complained that because moisture had seeped into the basement area through the basement wall, mould had developed, causing an unpleasant smell because of the excessive dampness. Mr. Shah indicated that this smell existed from the time that the owner took possession until the corrective measures were taken in the summer of 1987.

Mr. Else of the Program indicated in his evidence that if there was excessive moisture, mould would develop and the smell which Mr. Shah described would occur. Mr. Else indicated that in his inspection of the basement, the tarpaper was damp and in his opinion, this may have been because of internal moisture in the home. He also indicated that there is a normal "drying out" period which could be up to two years. Mr. Else also confirmed that the outside basement damp coating was in contravention of the Building Code because it was from 6 to 1 inches below grade. He indicated that his inspection of the home suggested that sufficient gravel had been placed around the basement wall so that there should have been no moisture problem. On the other hand, Mr. Else also indicated that most builders do not do a good job of providing gravel around basement walls and it is for this reason that the Building Code requires a damp coating up to grade which had not occurred at this home.

It is interesting to note that the dampness disappeared and the smell disappeared after the coating of the exterior basement wall was brought up to Building Code standards. Although Mr. Else indicated that this might occur within two years of construction, the Tribunal notes that this coincidence with the rectification of the Building Code requirements is significant. The Tribunal noted as well that Mr. Else, while indicating that the mould while inert would cause no problem, stated that the tarpaper should be replaced to prevent any problem if moisture reoccurs.

In view of this evidence and in view of the fact that no evidence was produced of excessive internal moisture, the Tribunal is of the view that the tarpaper should be replaced. The Tribunal does have some concern that Mr. Shah did not follow the recommendation of Mr. Else to try some dehumidification. This action might have supported Mr. Shah's case somewhat more clearly.

Notwithstanding, the Tribunal has reviewed the cases cited by counsel for the Program and finds them not compelling. In the case of York Condominium #340, 11 C.R.A.T. 134, the facts indicated a serious lack of ventilation. No such evidence was adduced to this Tribunal in this case. In the case of Raymond Lanctin, 16 C.R.A.T. 158, excessive moisture in the bathroom caused the problem. No such evidence was produced in this case. The only concern expressed was whether some dehumidification by Mr. Shah might have arrested the problem. Again the coincidence of the compliance with the Building Code and the cessation of the problem is to this Tribunal significant.

Accordingly pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to replace the tarpaper in the basement of the Applicant's home but that the Applicant contribute the sum of \$200.00 to the cost thereof.

SIDNEY SIMPSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
LOUIS A. RICE, Member

APPEARANCES:

HAROLD MALTZ, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 4 November 1987

Toronto

REASONS FOR DECISION AND ORDER

The Applicant's claim against the Ontario New Home Warranty Program under Section 14(1)(a) arises from a contract between him and his builder, one, Charles Currie.

On November 29th, 1984, Sidney Simpson entered into an unconditional Offer to Purchase a certain lot upon which he intended to construct a house. The vendor was Bernard Fleming. With that purpose in mind, Mr. Simpson contracted with Currie to have the house built with the completion date scheduled to be June 27th, 1985.

Currie, however, had recommended to Simpson that he enter into another Offer to Purchase with Fleming on March 26th, 1985, concerning the same lot. This offer contains some conditions with the closing date of August 2nd, 1985 but due to unforeseen circumstances, the transaction did not close, Mr. Simpson did not receive a Deed to the property until May 1st, 1987 and not from Fleming but from his contractor's mother, Oriana Currie, who had purchased the land.

In his final offer, among several, Simpson agreed with Oriana Currie to purchase the land and the house constructed thereon for a price of \$245,246.43 made up of the sum of \$73,734.00 already paid by Simpson toward the purchase price and the sum of \$171,512.00 required to bring a mortgage into good standing. This transaction closed on May 1st, 1987, the Deed in favour of Simpson being registered on that date as

Instrument No. 665487 and the Land Transfer Tax Affidavit reflecting the payment of \$245,246.43.

It would serve no useful purpose to relate the history of Simpson's dealings with his recalcitrant builder except to say that he immediately sold the house to one Hilary Powell under an Offer dated April 16th, 1987 and the transaction closed on May 20th, 1987. The sale price of \$262,500.00, however, is relevant. Mr. Simpson's frustration invites our sympathy, however, he appears on the face of it to have suffered no loss on these transactions but on the other hand, made a profit of \$17,253.57.

What damages then did Simpson suffer? The Tribunal accepts the evidence that he in fact incurred a loss on the sale of the house he had contracted to have built. That loss included the following figures submitted to the Tribunal in answer to specific questions concerning his damages.

He purchased the house of \$245,246.43 and sold it some two weeks later for \$262,500.00. His gain on that transaction appears to be \$17,253.57. He did, however, incur the following expenses in the two transactions:

Architect's fees	\$ 12,161.00
Drawings	2,000.00
Security system	750.00
Central vacuum system	1,500.00
Windows	1,891.00
Total legal fees	10,725.00
Real estate commission	<u>13,125.00</u>
Total	\$ <u>42,152.00</u>

The Applicant claims these as legitimate losses for which he should be compensated under Section 14(1)(a) of the Ontario New Home Warranties Plan Act which reads as follows:

...a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the

vendor or the vendor's failure to perform the contract.

Deducting from his total loss of \$42,152.00, his profit of \$17,253.57 on the sale, we arrive at a total loss of \$24,898.43. In considering Mr. Simpson's damages, however, one must determine what specific items are covered under the Program. It is trite to say that the Program does not provide for compensation for any real estate commission paid by Mr. Simpson on the sale of the property and we, therefore, must deduct the sum of \$13,125.00 from his loss. The security system of \$750.00, the central vacuum of \$1,500.00 and the cost of windows of \$1,891.00 are not items which were covered under the Program since these were extras. We, therefore, arrive at a loss of \$7,632.43 but the remaining items claimed of \$10,725.00 and \$14,161.00 represent legal fees, architect's fees and drawings.

The question then arises, should Mr. Simpson be compensated for legal fees incurred which appear were mainly the result of a Supreme Court action taken by him against Oriana Currie and her son, Charles Currie, over the construction of the house and dealings with the lot.

The question of legal fees has been dealt with thoroughly in the decision Re: Pomeroy which was an action against the Ontario New Home Warranty Program and decided on June 3rd, 1987. We may quote from the decision which held that legal fees were not within the scope or jurisdiction of the Tribunal to be awarded to an Applicant.

In reaching its decision, the Tribunal differentiates between those legal costs incurred by the Pomeroy's in dealing directly with the vendor in pursuing their claim for breach of warranty and the cost incurred in dealing with the Program. It is the Tribunal's opinion that legal expenses incurred by an owner who chooses to pursue the vendor rather than availing himself of the provisions of Section 17(2) of the Act, ought not to be allowed since such expenses would not naturally arise from the breach of the statutory warranty, nor could they be supposed to have been in the contemplation of the Legislature at the time the legislation was enacted.

While the Tribunal might take a different view about reasonable legal expenses incurred by an owner in a dispute with the Program itself relating to the statutory warranty, the fact remains that this Tribunal has no jurisdiction to award costs. Counsel for the Pomeroy's attempted to segregate the legal costs to those incurred prior to launching an appeal to this Tribunal and those incurred in presenting the appeal, and to categorize the former as damages and the latter as costs. However attractive this argument may be on the surface, the Tribunal believes that all the legal costs for necessary, relevant and useful services incurred in establishing what the fund should pay are encompassed in the term "costs", and not just those relating to the preparation for and appearances before this Tribunal.

The Pomeroy case may be differentiated from the present appeal on the basis that it was a claim under Section 14(1)(b) of the Act whereas the Simpson claim was brought under Section 14(1)(a) which in our view was proper. But in any claim under Section 14(1)(a), we must turn to the regulation and note that Section 6(3) provides as follows:

An owner who has a claim under clause 14(1)(a) of the Act in respect of a construction contract is entitled to be paid out of the guarantee fund, for all damages against the builder for financial loss, an amount equal to all damages to the home other than damages in respect of unfinished work to a maximum aggregate limit of \$20,000.00.

The Tribunal cannot find any evidence of loss incurred by the Applicant for which he should be compensated under Section 6(3). There was no evidence of damage to the home other than damages in respect of unfinished work, and the Section explicitly excludes reimbursement for unfinished work.

Mr. Maltz argues that the Tribunal should consider the possible relief provided by Section 10 of the Interpretation Act and we agree that where discretion is allowed, there is

merit in that argument. Unfortunately, however, the Tribunal is bound by the provisions of the Ontario New Home Warranties Plan Act and the regulation governing the claim of the Applicant is explicit in the relief the Program can offer.

Under the circumstances, although the Tribunal is sympathetic with the claim of Mr. Simpson, we cannot find any damages which he has suffered for which he can be compensated by the Program.

Therefore by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

HEATHER SWERN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

APPEARANCES:

HOWARD S. DYMENT, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 25 October 1988 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Heather Swern from the decision of the Ontario New Home Warranty Program to disallow her claim for compensation made under Section 14 of the Ontario New Home Warranties Plan Act (hereinafter referred to as the "Act"). The facts of the case are as follows:

The Applicant is an owner of a new home located at 235 Albert Hicks Drive. It was purchased on November 26th, 1980 from the builder. Possession of the premises was taken on November 26th, 1980.

The home was enrolled with Hudac (as it was then known) under the Ontario New Home Warranty Program, on June 15th, 1980 (see Exhibit 3, page 5).

During the spring of 1981, the first spring after taking possession of the home, water damage occurred in the basement of the new home.

On August 24th, 1981, the Applicant submitted to her solicitor a written list of the problems with the home (Exhibit 4, page 6).

On October 5th, 1981, the attorneys of Applicant sent formal letter to the builder listing in detail the various problems encountered in the home and asking that the

deficiencies be corrected (see Exhibit 3, page 7). A copy of the letter was sent to the attorneys of the builder, as well as to the Ontario New Home Warranty Program. The copy to the Ontario New Home Warranty Program was accompanied by a covering letter dated October 6th, 1981 (Exhibit 3, page 8).

The October 5th, 1981 letter of complaint contained three pages of which the following is pertinent to the present appeal:

Re Alan Swern and Heather Swern purchase
from 348909 Ontario Limited,
Part Lot 139, Plan M-1823
235 Robert Hicks Drive, North York

We are the solicitors for Mr. and Mrs. Swern the owners of the above noted property, which transaction was completed on or about the 27th day of October, 1980.

We have been advised by our clients that there are still a number of deficiencies and outstanding work to be completed at their property, the following of which are the particulars.

BASEMENT:

Carpeting is lifting and requires cleaning as a result of water seepage,
Paint is buckling and walls have turned moldy as a result of the water seepage.
Ceiling is bubbling.

.....

Would you kindly give these matters your immediate attention.

Yours very truly,
Dyment & Small

Barry S. Small

c.c. Chusid, Rakowsky, Polson, Friedman & Shapero
HUDAC New Home Warranty Program
Registration No. 10-914, Enrolment No. 75976

The letter of October 5th, 1981 was sent within the one year period established for the filing of claims in section 3(4) of the Act. Section 13(4) reads as follows:

A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

The Ontario New Home Warranty Program admits that the letter of October 5th, 1981 was received within the one year period.

On November 4th, 1981, the Ontario New Home Warranty program sent a form letter to the attorney of Applicant acknowledging receipt of the October 6th, 1981 letter with enclosure and asking for further information before processing the Applicant's request (Exhibit 3, page 9). The form letter indicated the address of Hudac as being at 180 Bloor Street West, Toronto even though representatives of the Program testified that Hudac had moved in July, 1981.

It is to be noted that the letter did not set out any actions should the Applicant not respond to it; nor did it indicate that the Program did not consider Applicant's letter of October 5th, 1981 as being a "claim" pursuant to section 3(4) of the Act.

From the evidence, it appears that the information requested by the Program was never received. In any case, nothing further occurred until a letter was written by Applicant's solicitors on February 15th, 1984 to the Program complaining of "severe water problems" in the basement, as well as other water damage (Exhibit 3, page 10).

Mr. Swern testified that up to 1984, water damage was occurring each spring in the basement and that the Program had not sent any representatives to verify the damages or to correct the problem.

Mr. G. Else, who testified on behalf of the Program, stated that the Program never received the letter of February 15th, 1984 - probably because it had been sent to the former address of the Ontario New Home Warranty Program.

Mr. Swern testified that further flooding problems occurred again in 1985 and in 1986. He stated that because no

action had been taken to correct the problems, he communicated with the City of North York, Building Department. This did not result in any resolution of his problem because further flooding occurred in 1987.

On May 20th, 1987, the Applicant's attorney again wrote to the Program at its former address. This letter was received by the Program. Again, the Applicant complains of the water damages and goes on to state that the problem was caused by the failure of the builder to install weeping tile. Furthermore, "the waterproofing around the house was very minimal." (Exhibit 3, page 12).

The Ontario New Home Warranty Program only acknowledged receipt of this letter on June 12th, 1987 (Exhibit 3, page 13). The Tribunal notes that while the Program appears to be denying liability in its letter of June 12th, it did not do so by way of a formal decision in that it failed to follow section 16(2) of the Act. Section 16(2) requires that, where the Program makes a decision under section 14, its notice of the decision "shall" inform an applicant that "he is entitled to a hearing by the Tribunal if he mails or delivers within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal."

Thus, while the Program denied liability, it did not do so by way of a formal decision, despite the requirements of the Act.

In further communications between the Applicant's attorney and the Program, the Program continued to deny any liability, but never by way of a formal decision that satisfies the provisions of the Act. (See letter of June 30th, 1987, Exhibit 3, page 15.)

In a letter dated July 16th, 1987, the attorney for Applicant demanded an outright refusal of the claim so that an appeal could be launched to the Commercial Registration Appeal Tribunal (Exhibit 3, page 16).

In response to this letter, some five weeks later, on August 20th, 1987, the Program sent a Proof of Claim form to be completed by the Applicants before the Program would act. The Program sought, as well, a copy of the purchase contract of the home and the invoices covering the repairs. (Exhibit 3, page 19).

In his testimony on behalf of the Program, Mr. Else stated that no complaint of a homeowner would be considered complete until a Proof of Claim form was filled out and received by the Program.

The Tribunal cannot understand why the Program did not send a Proof of Claim form with its first letter in response to the homeowner's complaint, viz. on November 4th, 1981, if this form was required for the purpose of establishing and verifying loss. Section 4(2) of the Regulations to the Act specifically directs the Program to furnish immediately all forms which it requires. Since the Program stated that it required the Proof of Claim form to proceed with the homeowner's complaint, it clearly breached section 4(2) of the Regulations in failing to provide it on November 4th, 1981. The immediate sending of this form becomes absolutely imperative if the failure of the Applicant to produce it could be cited to bar a claim.

The Applicant sent a Proof of Claim form on January 2nd, 1988, claiming \$7,026.68, being the cost to repair the damages which occurred because of the breach of warranty (Exhibit 3, page 20).

In response thereto, the Program refused again to render a formal decision while continuing to deny liability (Exhibit 3, page 22).

In response to a further letter from Applicant's attorney, the Ontario New Home Warranty Program finally rendered a legal decision with respect to the claim (Exhibit 3, page 24).

The decision refers to the Applicant's initial letter of October 5th, 1981 as being a "complaint letter". The decision also adds a further condition before which a "complaint letter" would become a claim:

In order to warrant deficiencies, an inspection must be carried out by the Program.

The decision denies Applicant's claim holding that the initial letter, the "complaint letter", was not a claim and therefore the Applicant had failed to file a claim within the one year period fixed by section 13(4) of the Act.

In his testimony, Mr. Else, stated that internal

practice of the Program determined that a complaint would be treated as a claim only when information as to possession had been provided, together with a Proof of Claim form. An inspection might also be required.

The Applicant, on the other hand, believes that the initial letter of October 5th, 1981 should be treated as a claim because it contained all the elements of a claim.

The major issue before the Tribunal is whether the letter of October 5th, 1981 constitutes a claim within the meaning of the Act and its Regulations. If it does, then the Applicant exercised his recourse within the one year period fixed by section 13(4) of the Act; if it does not, then the Applicant's claim would be barred.

The Act and its Regulations, while using the word "claim", do not define it. Section 4(1) of the Regulations states that "each person with a claim under the Plan shall give written notice of the claim to the Corporation." Nowhere does the Act or Regulations prescribe the form of a document or its contents in order to qualify as a "claim".

In answering the question of what qualifies as a claim properly made, the Tribunal must refer back to the intent of the statute.

In the case of Mr. and Mrs. Ronald Pomeroy (1987) 16 CRAT 173 at p.175, the Tribunal stated:

The intent of the Ontario New Home Warranties Plan Act is to insure that buyers of new homes...are protected against financial loss up to a specified maximum because of defects in workmanship or materials, or major structural defects as defined in the Regulations.

For this reason, the Tribunal will interpret in a reasonable and broad manner what constitutes a "claim". To interpret the word "claim" restrictively would be to go against the spirit and intent of the Act - the protection of the new home buyer.

It is clear that the Tribunal cannot be bound by the definition which the Program has given of the term "claim". Moreover, the fact that the Program may have internal practice requiring certain forms and documents to be filed before it

considers a complaint to be a claim, will be of no avail if such practices go against the provisions of the Act and its regulations. Thus, the Program may not impose on homeowners any practices whose effect is to limit or remove the rights given them by the Act or Regulations.

The Tribunal believes that the letter of complaint of the Applicant dated October 5th, 1981 constitutes a claim properly formed within the provisions of the Act. The letter indicates the nature of the homeowner's problem; it also indicates a date of possession, which, as it turned out, was given earlier than when possession was actually taken. The date of possession given fell squarely within the one year warranty period.

Under the circumstances, the Program, within the year, had knowledge of the nature of the homeowner's problems and of the damages he was suffering. It was clear from the letter that the homeowner was seeking a correction of the deficiencies and that he was looking to the Program for restitution should the builder fail to honor his warranty.

While the Program was certainly within its rights to seek further information, it could not argue that it had not received a claim properly formed.

The High Court of Justice decided a case with a similar fact pattern in Re: York Condominium Corp. No. 528 and Ontario New Home Warranty Program 60 O.R. (2nd) p.662. It held:

the appellant was entitled to recover the cost of repairs from the programme. It was sufficient that the programme was notified within the limitation period of the symptoms of the problem. It would be impractical and unfair to expect the owner to notify the programme of the cause of the problem and the appropriate remedy within the year.

In the York Condo case, the owners submitted deficiency lists to the developer with copies to the Ontario New Home Warranty Program. One of the deficiencies was referred to as "water penetration". The Court held at page 666 of the judgment that in submitting the lists in writing, the applicant had complied with the Regulations in that regard with respect to making a claim.

It was held at page 675 of the judgment that the listed deficiencies was sufficient in that the respondent then knew that there was water penetration into the building, and that this formed the nature of the complaint by the applicant. While the notices did not specify the cause of the water penetration, it was held that they were satisfactory so long "as they indicated the symptoms of the problems which they did

The Tribunal believes that the test set out in the York Condominium Corp. is a reasonable one; a complaint will constitute a claim provided it indicates the symptoms of the problem which the new homeowner is facing.

Under the circumstances, the letter of complaint by the applicant's attorney dated October 4th, 1981 constituted a valid claim under section 13(4) of the Act.

The Ontario New Home Warranty Program has also complained of the lengthy delays in the prosecution of the Applicant's complaint. It has been some seven years since the complaint was first made.

The Tribunal believes that the Program is as responsible as the Applicant for the lengthy delays. A review of the correspondence between the Applicant and the Program indicates:

1. The Program failed to give its new address upon the information form dated November 4th, 1981.
2. When the Program failed to receive a response to the November 4th, 1981 request for information, it did not send out a follow-up of any kind. Instead, it simply suspended all further processing of the complaint.
3. When Applicant's attorneys became more pressing in 1987, letters from the Ontario New Home Warranty Program often contained wrong information and showed an unwillingness to deal with Applicant's problems.
4. The Ontario New Home Warranty Program delayed in rendering a decision from which the Applicant could appeal despite requests to do so.

The Tribunal also finds that the Applicant was not diligent in prosecuting its claim. In failing to do so, the Applicant was penalized as well: she had to live with a recurring problem for six years. In addition, the problem itself became aggravated as a result of the delay.

The claim by the Applicant falls within the ambit of the Ontario New Home Warranties Plan Act. This being the case, the Tribunal must now determine the amount of damages to which the Applicant is entitled.

The Applicant claims \$7,026.68, being the amount he paid to A & M Contractors to install weeping tiles and to carry out the other work necessary to properly waterproof the basement.

Albert Macedo supervised the work and acknowledged receiving payment in the sum of \$7,026.68. In carrying out the work, he used concrete to pave the patio instead of the patio stones that were already there. He admitted that doing so was more expensive than using patio stone.

Mr. Gerald Else testified that the Program never visited the Applicant's premises before the repairs were carried out. He stated, however, that the installation of the concrete created additional costs which were not necessary because concrete cost 70% more to install than patio stone. Mr. Else has also stated that the delay in carrying out the repairs created an additional cost when they were finally executed.

Applicant has also admitted that the delay aggravated the problem. In his letter of June 16th, 1987 (Exhibit 3, page 4), the Applicant stated: "This problem became much more serious over the years as the builder nor yourselves did anything at the time to rectify the situation." The Applicant could have mitigated the damages had he proceeded with repairs at an earlier date.

The Tribunal believes that using concrete instead of reusing the patio stones was not justified. There was no proof made that the patio stones were damaged because of the problem with the water seepage into the basement. Since patio stones are water resistant, the Tribunal believes it is highly improbable that the stones could have been damaged as a result of the water seepage problem.

In addition, the Tribunal finds that the damages themselves were aggravated because of the delay of Applicant in carrying out the repairs.

Under the circumstances, the Tribunal believes that Applicant's claim should be reduced by 30%.

The Tribunal, therefore, directs the Ontario New Home Warranty Program to pay the Applicant the sum of \$4,918.68.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow 70% of Applicant's claim and to pay to the Applicant the sum of \$4,918.68.

ARMAND VAN MENSEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:

CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF HEARING: 30 August 1988 Toronto

REASONS FOR DECISION AND ORDER

The Applicant having been given an opportunity to appear and not appearing, the Tribunal empowered to proceed in his absence has done so this morning and heard the evidence adduced by counsel for the Program.

It is clear that the builder Mr. Van Mensel is in breach of the Act, particularly section 8(2), because of his refusal to conform to the Regulations and I refer to Regulation 26, subsection 3 and Regulation 728, subsections 5 and 6 which provide that the builder shall upon request of the Registrar file a financial statement. Mr. Van Mensel has, for whatever reason, refused to do so. It appears, according to the evidence, that Mr. Van Mensel's accountant, a Mr. Leonard Lucier has been in communication with the Program's Registrar and that the financial statements which may satisfy the Program are prepared, but have not been released. It appears that that Mr. Van Mensel has not authorized the release of these statements to the Program.

Under the circumstances, Mr. Van Mensel, having been given every opportunity, (which is clear from the correspondence) to provide the Program with the necessary information, being in breach of the Act will have his licence revoked if the statements are not provided to the Program on or before the 1st day of October next.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Ontario New Home Warranties Plan Act the Tribunal directs the Registrar to carry out his Proposal if the builder Armand Van Mensel has failed to provide the Registrar with the required financial statements on or before the 1st day of October next.

AN VERA

APPEAL FROM TWO DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

RIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

PEARANCES:

EUGENE TRAESWICK, agent for the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

ATE OF
EARING: 26 October 1988 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from two decisions of the Ontario New Home Warranty Program. The first decision was dated March 5th, 1988 and the second, July 11th, 1988. These decisions dismissed the Applicant's claim for unspecified damages with respect to the rebricking of his house and to a claim of \$300.00 as damages for the cost of replacement of six shutters which the Applicant alleges were damaged by the bricklayers while they carried out their work.

We shall deal first with the claim respecting the rebricking. Mr. Vera testified that the rebricking was carried out in a satisfactory manner and with good workmanship. He further stated that at the present, eleven months after the work was carried out, there were no problems of any kind with respect to the bricking. He also stated that the work was covered by a five year warranty.

Mr. Vera's sole complaint is that the rebricking was done at a temperature less than 5 degrees centigrade during installation and/or less than 48 hours after installation, the sole in breach of subsection 9.20.16.1 of the Ontario Building Code.

While the work was carried out in a workmanlike manner and was free from defects in material, Mr. Vera has claimed unspecified damages under section 13(1)(a)(iii) of the Ontario

New Home Warranties Plan Act because of the alleged breach of the Ontario Building Code.

The Tribunal notes that both Mr. Vera and his agent refused to specify the amount of damages to which Vera was entitled. They also admitted that no financial loss had been suffered as a result of any breach.

Section 14 sets out the authority of the Tribunal in granting compensation to an Applicant. Section 14(1)(b) states that "an owner has a cause of action against a vendor for damages resulting from a breach of warranty." Even if we assume that a breach of warranty has occurred, Mr. Vera, by his own admission, has suffered no damages resulting from the said breach. Under the circumstances, he has no claim for damages against the Ontario New Home Warranty Program.

Although not material to the present case, the Tribunal assumes that the Ontario New Home Warranty Program engages contractors which follow the provisions of the Ontario Building Code.

Mr. Vera has also claimed \$300.00 as damages for the cost to replace six shutters which were damaged. In his testimony, Mr. Vera stated that the shutters had been on the house for two years and that he had not noticed any damages to them until after they had been removed.

He alleged that he told a representative of the Ontario Home Warranty Program, as well as the bricklayer, of the damages.

In inspecting the shutters, the Tribunal noted small dents on three of them and a scratch mark on the fourth; the two other shutters were undamaged.

Mr. Vera felt that he was entitled to replace all six shutters, whether damaged or not, because their paint colour did not match the colour of the aluminum siding which he had chosen to replace the former aluminum siding.

Mr. Eduardo Vercillo testified on behalf of the Ontario New Home Warranty Program. He declared that he was the contractor who rebricked Mr. Vera's home. He stated that he removed the shutters with one of his workers and that at the time of removing and giving possession of them to Mr. Vera, no damages were caused. He also declared that Mr. Vera never complained to him about the shutters.

Upon the evidence before it, the Tribunal finds that the Ontario New Home Warranty Program is not responsible for any damages to the shutters. It is to be noted that the shutters had been hanging for two years and would be subject to normal wear and tear. As to the problem with the colour, Mr. Vera chose the colour of siding that he wanted while knowing full well the colour of the shutters.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.

VLADIMIR BAOTIC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
GEORGE J. CORMACK, Member

APPEARANCES:

VLADIMIR BAOTIC, appearing on his own behalf
JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers.

DATE OF
HEARING: 7 December 1987

Toronto

REASONS FOR DECISION AND ORDER

Having been stripped of his registration as a real estate broker by Order of this Tribunal following a hearing in November of 1986, Vladimir Baotic, the Applicant applied for re-registration as a broker seven months later in August 1987. The reasons underlying the Tribunal's decision are set out at pages 176 - 178 of the most recent volume of Commercial Registration Appeal Tribunal Summaries of Decisions, those for the year 1986.

Principal among these reasons was the fact that Mr. Baotic had been convicted on some thirty-seven counts of misappropriation of trust funds. As stated, in August 1987, the Applicant made a fresh application for registration which was rejected by the Registrar and the Registrar has issued the Notice of Proposal to refuse registration in which his reasons for so doing are set out in particular at paragraphs 5 and 6 thereof.

5. The applicant has applied for registration by an application dated the 4th of August, 1987. In answer to question no. 7 contained on the affidavit, the applicant failed to disclose his record of convictions.
6. The applicant has not disclosed to the Registrar any change in circumstances

that warrant the Registrar changing his belief that the applicant will not carry on business in accordance with law and with integrity and honesty.

Section 10 of the Real Estate and Business Brokers Act reads as follows:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

In our opinion the Applicant has failed to demonstrate the existence of these two criteria upon which his eligibility for fresh registration would depend. To the contrary, he has made matters worse by making a false statement or at least by failing to disclose essential facts in the August application.

Mr. Baotic has made it clear that he is physically unable to do work other than desk work and also that his career to date has largely been in the real estate field - thus his livelihood appears to be at stake. The case is, therefore, rather a hard one, but the Tribunal nevertheless finds itself unable to help him. In our view, he does not qualify under the law of the Province of Ontario as it stands to carry on business in this industry as a broker. It is our view that the provisions of Section 10 have certainly not been met and, moreover, Mr. Baotic during this hearing has demonstrated a certain lack of comprehension or fuzziness in his thinking in respect to the realities of the real estate industry and the law under which it is conducted which suggests he may never qualify to be licensed; at least not as a broker although at some point he possibly might succeed in convincing the Registrar that he might be safely entrusted with the responsibilities of a salesman under adequate supervision if available.

Consequently by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out the Proposal and refuse registration to this Applicant.

FREDERICK A. BULLOCK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
A. DONALD MANCHESTER, Member

APPEARANCES:
G. COLIN RAYNER, representing the Applicant
STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 24 November 1988 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the Applicant, Frederick A. Bullock, as a real estate salesman. The reasons given by the Registrar for his Proposal are that:

- (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and/or
- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The basic facts, which are not in dispute, are as follows:

On January 4th, 1988, the Applicant applied to become registered as a real estate salesman in the employ of NRS Burlington Realty Limited. The application was filed as Exhibit 6.

In response to question 7 of the application, Exhibit , as to whether the Applicant had ever been convicted of an offence, the Applicant responded "Yes" and went on to state:

In March of 1985 I was charged with theft over \$200. Although this involved one trust account, the charge was changed to reflect the number of people represented by this account.

In April of 1985 I sold my business "Bullock Funeral Home" in order to make restitution and am still repaying the difference of approx. \$19,000.

In May of 1985 I was sentenced to 1 year of incarceration & upon my conviction my Funeral Director's Lic. was revoked.

In November of 1985 was released on Ontario Parole which was completed successfully on June 27, 1986.

#4(B) I had applied for a car salesman's lic. under this act and was not given it, but was told to re-apply at a later date.

In fact, the Applicant had previously been registered as a Funeral Director under the Funeral Services Act and carried on business under the name the "Bullock Funeral Home". During the period 1976 to 1985, the Applicant operated the funeral home in the Town of Dunnville.

On April 17th, 1985, the Applicant pleaded guilty to 8 counts of theft over \$200 contrary to Section 294(a) of the Criminal Code. Following his conviction, he was sentenced to 60 days on each count, concurrent, to be served intermittently to be followed by probation for 30 months and a compensation order.

The sentence was varied on appeal by the Supreme Court of Ontario in August of 1985, increasing the custodial sentence from 60 days imprisonment to one year on each count, concurrent.

The thefts arose while the Applicant was owner and operator of the funeral home; he had accepted money from the

public for pre-arranged funeral services. These funds, pursuant to the Pre-arranged Funeral Services Act, were required to be placed in trust accounts, administered by the Applicant. In fact, the Applicant used the trust monies for operating expenses and for his own use. The Applicant admitted that he commenced this course of conduct in 1978 and it continued until the charges were laid in 1984.

The amount of money paid to the Applicant by the victims amounted to \$119,000. Many of the victims were elderly people.

To arrange for restitution of some of the damages caused, the Applicant sold the funeral home. Despite the sale, there remained a sum of \$20,000 owing to the victims. It was this amount which was subject to the compensation order. To date, the Applicant has repaid \$2,000, leaving a balance of \$18,000 still owing under the compensation order made pursuant to Section 653 of the Criminal Code.

In April 1985, the Applicant was found guilty of professional misconduct under the Funeral Services Act because he had converted to his own use, monies paid in trust to him, under the Pre-arranged Funeral Services Act. The Discipline Committee revoked his licence as a Funeral Director in April 1985.

On February 5th, 1986, the Applicant applied to become registered as a motor vehicle salesman under the Motor Vehicle Dealers Act. The Registrar refused registration by Notice of Proposal dated April 28th, 1986. The decision of the Registrar was upheld on appeal to the Commercial Registration Appeal Tribunal by its decision of August 19th, 1986. In upholding the decision of the Registrar, the Tribunal stated as follows:

In reviewing all of the evidence presented to it, the Tribunal notes that the thefts were committed over a long period of time - almost a decade. They were committed by a mature individual who evidently had the confidence and respect of the community. He abused this confidence in a shameful manner. The fact that he co-operated with the police after he was found out does not show honesty or integrity. By his own admission, he was tempted by the easy access he had to the general trust

account and even though he knew that what he was doing was wrong, he could not resist that temptation.

Since his release from prison, the Applicant has worked as a labourer at Silverthorne Car Sales from May 1985 through October 1986 and at Grand River Dodge from October 1986 through October 1987.

Mr. Gordon Randall, the Registrar of Real Estate and Business Brokers, was the sole witness to appear at the hearing. Although Mr. Bullock was present, together with his lawyer, he did not testify; nor did any witness testify on his behalf. Mr. Bullock did submit letters of recommendation from four individuals and these letters were produced as Exhibit 10.

In his testimony, Mr. Randall stated that he had been in the real estate industry for 21 years prior to becoming Registrar, including three years as a real estate salesman.

He stated that from his personal knowledge, he knew that the duties of real estate salespersons involve negotiations outside of the real estate office and, therefore, outside of the direct control of an employer.

The public, he declared, depended on a broker for advice on what price to buy or sell a home or building, the amount of any deposit, and to administer deposits received. These fiduciary duties are of equal importance.

Mr. Randall stated that while he was a salesperson, he had once received \$17,000 in cash as a deposit from a client. Furthermore, during the three years he was a salesman, he received anywhere from 10 to 20 deposits in cash.

He went on to state that clients almost invariably asked him to whom they should make payable deposit cheques, as well as the amount. Because deposits in real estate tend to be substantial, buyers and sellers must put a great deal of trust in their real estate salesman.

Mr. Randall refused to grant registration to the Applicant because he felt it would be a threat to the public. The purpose of the Real Estate and Business Brokers Act is to protect the consumer and to set the standards which salesmen must meet if the public is to have confidence in them and the industry.

He stressed that the Applicant had not committed one isolated case of theft, but rather done so on 78 occasions over a period of nine years. As a real estate salesman, he would also be directly involved in administering trust funds. But this time the funds deposited would be far greater than any he had received as a Funeral Director.

In addition, in the two years since he has left prison, the Applicant has not been involved in any form of occupation which would demonstrate that he could now be trusted in handling client deposits.

Counsel for the Registrar argued that the Registrar is justified in refusing registration because the past conduct of the Applicant affords reasonable grounds for believing that he will not carry on business in accordance with law and with integrity. The Applicant, moreover, has still repaid only \$2,000 of the \$20,000 owing under the compensation order.

In rebuttal, the attorney for Applicant invoked Section 11(f) of the Charter of Rights, claiming that the Applicant is being punished a second time for the same crime by not being registered as a salesman. He stated that the Applicant had paid for his crimes and should now be permitted to become registered as a real estate salesman.

In reaching its decision in this matter, the Tribunal has placed particular emphasis on the degree of trust which a consumer must place in his salesman when dealing in real estate. The consumer looks to his salesman not only to receive and administer deposits, whether in cash or by cheque, but also depends on the salesman for vital advice. How much should he offer for a home or building? What amount should his deposit be? Is the home he wants within his means?

A salesman is subject to certain important temptations: if he encourages the consumer to offer a higher price, he will receive a larger commission; and yet it is in the consumer's interest that the sales price be as low as possible. In the same way, a consumer wishing to sell should receive the highest possible price. He depends on the salesman not suggesting a lower price just to generate a sale and therefore a commission.

On the basis of the foregoing, it is clear that only people who demonstrate that they can fulfil their fiduciary duties should be permitted to become registered as salesperson under the Act.

With respect to Applicant's argument that registration should not be denied because it would constitute a breach under Section 11(f) of the Charter of Rights, the Tribunal is satisfied that this argument is not relevant to these proceedings. The effect of Section 11 was discussed in relation to a regulatory statute in Re: Petroleum Products Act 33 D.L.R. (4th) p.680. The headnote reads in part as follows:

Section 10 of the Petroleum Products Act empowers the Public Utilities Commission to suspend, revoke or cancel a licence. It is pure administrative law which does not call upon criminal law or the threat of imprisonment to aid its enforcement. Proceedings subjecting a licensee to the controls of a regulated industry are not by nature criminal. The Commission does not have any power to impose criminal-like sanctions. The mere fact that a legislative sanction can in some sense be characterized as a punishment is not sufficient to classify the proceedings imposing the sanction as a proceeding in relation to an offence within the meaning of Section 11.

This Tribunal followed the Re: Petroleum Products Act judgment in the case of Orval David Bradt (1987) CRAT Volume 16, page 202.

Is the Applicant entitled to registration under the Real Estate and Business Brokers Act or has he become disentitled by virtue of Section 6? It is the Registrar who has the burden of proof of satisfying the Tribunal that the provisions of Section 6 prevail, that the past conduct of the Applicant is such that it affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The standard of proof to be followed by the Tribunal is not as high as in a criminal prosecution and was set out in Re: Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2d), p.470. The decision of Mr. Justice O'Leary reads in part as follows:

In all cases, before reaching a conclusion of fact, the Tribunal must be reasonably satisfied that the fact occurred, and whether the Tribunal is so

satisfied will depend on the totality of the circumstances, including the nature and consequences of the fact or facts to be proved, the seriousness of the allegation made, and the gravity of the consequences that will flow from a particular finding.

The Tribunal also follows the decision in 1983 of the Divisional Court in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen where the Court held that "...unless the Tribunal can find that it [past conduct] does not [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his proposal."

The above-mentioned judgments were also followed by this Tribunal in: Vito Luigi Calogero (1987) CRAT Volume 16, p.206 at p.211 and 212; Jack Ross Lane (1987) CRAT Volume 16, p.232 at p.233 and 234.

The Tribunal believes the Applicant has not acted with honesty and integrity in the past and the cumulative effect of his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty in the future.

The criminal offences for which the Applicant was convicted took place over a seven year period and show a continuous course of conduct. They were discovered only by virtue of an audit under the Funeral Services Act, and not because of any declaration by the Applicant.

In the case of Israel Jakobs (1987) CRAT Volume 16, p.223, this Tribunal heard a case with relatively similar facts. The Jakobs case, however, only constituted one breach of trust. He was convicted on a charge of theft of property exceeding a value of \$200. This occurred when Mr. Jakobs, while in the employ of a jeweller, substituted zircons for diamonds which had been brought by a client for cleaning and polishing. This Tribunal, in upholding the decision by the Registrar to refuse registration to Mr. Jakobs, stated at page 226:

...However, the Tribunal must weigh the interests of the public against the interests of and sympathy it may have for the Applicant. On balance, the public interest must prevail in this case.

The Tribunal has taken into account that Mr. Jakobs was forthright in disclosing his criminal record in his application and his evident resolve to turn his life around and to make something of it.

A criminal record, of itself, is not necessarily a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

The Tribunal is also mindful of the fact that the Applicant as yet has not made the required restitution of \$20,000. This is an additional reason for denying registration. It leads the Tribunal to believe that having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business. [See the case of Saffet Mertel (1987) CRAT Volume 16, p.251 at p.253.]

In denying registration to the Applicant, the Tribunal is fulfilling its primary duty which is to protect the public from persons who would take advantage of their position of trust. This duty of the Tribunal was described very clearly in

the case of Gary Brian Williamson (1987) CRAT Volume 16, p.266 at p.270 where the Tribunal held:

The Tribunal must also give careful consideration to the fact that the charges of which the Applicant was convicted in 1985, and for which he served a prison sentence, arose directly as the result of his actions in breach of the public trust. The regulation of the real estate industry is motivated precisely by the need to protect innocent members of the public from being victimized by persons who would breach the public trust.

In its decision in the case of Giovanni Giannini (14 CRAT, p.179), the Tribunal stated:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved. Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today...

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal.

KENNETH CHARTRAND

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
FREDERICK H. SHERWOOD, Member

APPEARANCES:

KENNETH CHARTRAND, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 13 July 1988

Ottawa

REASONS FOR DECISION AND ORDER

This is an application by the Applicant Kenneth Chartrand to the Commercial Registration Appeal Tribunal to reverse the Proposal of the Registrar under the Real Estate and Business Brokers Act to refuse registration to this Applicant on the basis that the conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Evidence presented to this Tribunal by the Applicant indicated that the Applicant was convicted of conspiracy to import narcotics in March 1986 and sentenced to a period of incarceration of 7 years. It was further indicated that the Applicant was released from custody and from a half-way house programme on July 5th, 1988 and is now living at home with his wife, but is required to report regularly in accordance with the terms of his parole until March 4th, 1993.

Counsel for the Registrar submitted that the Applicant should not be considered for registration until such time as the Applicant's sentence has been served and his parole completed in 1993. Counsel referred the Tribunal to the decision of this Tribunal in the second Brian F. Sunderland case reported at 16 CRAT Summaries of Decisions (1987) p. 125 in similar circumstances. The decision referred to the first Sunderland decision that consideration for registration could be given "depending upon the circumstances in which he achieves

the expiration of his parole." The Tribunal in the second Sunderland case came to the conclusion that Sunderland was in the process of rehabilitation but that that process was not yet completed and would not be so completed at least until the expiration of his parole. In the present case, Chartrand has been released from his controlled supervision only within the past week, July 5th, 1988, and will continue under parole until March 4th, 1993.

This Tribunal approves the decision of the Tribunal both in the first and second Sunderland cases, that a period of rehabilitation is necessary to establish that an individual no longer lacks honesty and integrity and will conduct his business in accordance with the law. It is also the view of this Tribunal that the period of sentence, including any parole period within that time should reasonably be considered as the minimum rehabilitation period. This is not to say that in certain circumstances and with respect to certain crimes a lesser period may be appropriate to assess effective rehabilitation, but certainly in the case of crimes involving financial or fiduciary matters, great care should be taken by the Tribunal in permitting registration of a salesman in such profession as that governed by the Real Estate and Business Brokers Act. This was clearly the view of the Tribunal in the Gary Brian Williamson case 16 CRAT (1987) p. 266, which stated at page 271:

...while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

The Tribunal must also take into account the potential damage to the public's perception of and confidence in the industry which the registration of persons convicted of fraud, particularly in the context of a situation as notorious as the Argosy collapse, would have.

This Tribunal is prepared to consider, in its responsibility to the public of Ontario that trafficking in

narcotics or conspiring to so traffic is equally likely to affect the public's perception of the industry and confidence in it.

The Tribunal in that case also approved the statement from the Giovanni Giannini case, 14 CRAT (1985) p. 179:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women...Only persons of complete trustworthiness should be considered suitable for registration...

(emphasis added)

Under cross-examination, Mr. Chartrand admitted that he was convicted on three charges of conspiring to import narcotics for the purpose of trafficking and was sentenced to seven years in prison, which the Tribunal notes is not an insubstantial sentence. He indicated that 30 people were charged, that he was considered to be the ringleader, that tons of drugs were imported, that the marijuana imported was sold to others for resale, that he had no concern for the end users of the drug or who they might be, whether school children or others, that he considered such trafficking merely "a business" from which he made an income of \$2,000,000 approximately in the four years from 1978 until he was arrested and charged in February 1982. He also informed the Tribunal that although he considered this a business, he failed to report any income to Revenue Canada or pay tax thereon and that only after his conviction when Revenue Canada assessed him, did he make any arrangements for payment of any tax liability in respect to this "business".

Mr. Chartrand indicated that he had always been honest with his associates, was knowledgeable in the construction industry, had successfully completed the real estate course and was a good salesman. Having observed Mr. Chartrand during the course of the hearing, the Tribunal is not prepared to gainsay these attributes. But what of his consideration of the general public with whom he will come in contact if registered as a real estate salesman? What about consideration of the provisions of clause 6(1)(b) of the Real Estate and Business Brokers Act? Does his past conduct afford reasonable grounds for belief "that he will not carry on business in accordance with law and with integrity and honesty?" (emphasis added)

Counsel for the Registrar submitted that Mr. Chartrand has a moral blind spot. Having questioned Mr. Chartrand and having observed his attitude as expressed to the Tribunal, the Tribunal comes to the same conclusion. Mr. Chartrand indicated no remorse for his conduct, in fact, simply concluded that it was a money-making business. The fact that such business was illegal by the laws of Canada did not appear to make any impression on him nor did he consider that he had any responsibility to pay any income tax, again another law of Canada ingored by him.

Because the hearing before this Tribunal is a hearing de novo, the Tribunal is entitled to look at all the evidence presented to it and make its decision on that evidence - in particular as to the Applicant's past conduct. Mr. Chartrand clearly indicated that financial considerations motivated him to such a degree in the past that he was prepared to ignore the law of Canada; he demonstrated to the Tribunal such a lack of concern for the effect which his activities might create as to reveal himself lacking in integrity and honesty in dealing with the general public.

In closing the Tribunal would like to indicate what may have been indicated to the Applicant or his sponsoring broker by the former Registrar prior to his embarking on the Real Estate course of study and application as a salesman is not material in this case because the Applicant has been afforded a full opportunity before this Tribunal to present his position.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out her Proposal.

MAURICE L. COHEN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

RIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
RICHARD F. STEPHENSON, Member
SADIE MORANIS, Member

APPEARANCES:

NATALIE BRONSTEIN, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers.

DATE OF 4, 5 November 1987
HEARING: 11, 16 December 1987

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Proposal of the Registrar of Real Estate and Business Brokers Act, dated November 19th, 1987, wherein the Registrar proposes to refuse to register the applicant as a real estate salesman. The Applicant, Maurice Cohen, also known as Lawrence M. Cohen, at this time is an undischarged bankrupt and a disbarred lawyer. In 1986, he was found guilty of theft and fraud and has now completed serving his jail sentence. Mr. Cohen had been registered as a real estate salesman during the period October 4th, 1985 to October 4th, 1987, but his registration terminated when he failed to apply to renew his registration within the prescribed time. On November 10th, 1987, Mr. Cohen did apply for renewal but his application, which was by then considered an application for registration, was denied by the Registrar and the Notice of Proposal issued. In the Registrar's opinion, Mr. Cohen's past conduct and his financial position disentitle him from registration as a real estate salesman.

background

In September 1985, the Registrar received an application from Maurice L. Cohen. The application (Exhibit 4) was fully completed. Mr. Cohen, under the name of Maurice L. Cohen, showed that he had been self-employed during the period from April 1981 to September 1985, selling fishing tackle and working in flea markets; that he had never been registered

under any Act; that he was never a party to bankruptcy proceedings; that he had no outstanding judgements against him that he had never been convicted under any law and had no outstanding charges pending against him. Mr. Cohen gave his date of birth as January 9th, 1935.

On the basis of the information provided in this application, the Registrar registered Mr. Cohen as a salesman under the Real Estate and Business Brokers Act.

Sometime in early October, 1986, William MacKinnon, a Investigator with the Ministry of Consumer and Commercial Relations received a telephone tip that a disbarred lawyer was working as a real estate salesman. At about the same time, he found a report in a Toronto daily newspaper that a Lawrence Cohen, who was described as a former real estate lawyer who had been disbarred in 1984, had been convicted of fraud and theft. Mr. MacKinnon, without any specific written authorization from the Registrar, initiated an investigation and found that Lawrence Cohen and Maurice L. Cohen were one and the same person. He also found that essentially all of the responses to the September 1985 application, including the date of birth, were false. He reported his finding to the Registrar, then Allan Coleclough.

Mr. Cohen was asked to present himself before the Registrar and did so on April 3rd, 1987. After the meeting with the Registrar, a Notice of Proposal to Revoke Registration, dated June 10th, 1987 was issued and was appealed by Mr. Cohen. The hearing of that appeal took place on November 4th and 5th, 1987, and at the conclusion of argument the Tribunal reserved its decision. Before the Tribunal could render its decision, it was advised by counsel for the Registrar by letter dated November 19th, 1987 that Mr. Cohen's registration had terminated on October 4th, 1987 and that therefore the Tribunal had no jurisdiction to hear the appeal. With the same letter, a new Notice of Proposal to Refuse Registration was filed which virtually incorporated all of the allegations and opinions contained in the Notice to Proposal Revoke Registration dated June 10th, 1987, but which recited the additional facts that Mr. Cohen's registration had terminated on October 4th, 1987 and that he had applied for registration on November 10th, 1987.

Counsel's letter (Exhibit 2) also stated in part that

Both myself and Ms. Bronstein are willing to have the Tribunal proceed to make its decision on the Proposal to

Refuse Registration based on the evidence and argument put forward at the November 4th, 1987 hearing. Both counsel have agreed that there are no new matters that would require further submissions before the Tribunal.

On the basis of this letter, the Tribunal issued a ruling on November 24th, 1987 to the effect that it had no jurisdiction to render a decision with respect to the Proposal to revoke registration.

A Notice Requiring a Hearing in relation to the new Proposal was received from Mr. Cohen's counsel on November 23rd, 1987, and, in order to accommodate all parties the matter was set down for hearing on December 11th, 1987. Upon opening the hearing on that date, the Tribunal formed the opinion that the parties were not adequately prepared to proceed in an expeditious manner and it adjourned the hearing of its own motion. The hearing was rescheduled for December 16th, 1987, at which time both counsel submitted that the evidence and arguments as heard on November 4th and 5th be adopted for purposes of the current hearing. The Tribunal is content to proceed on this basis. The Tribunal did hear some additional evidence as to procedures in the Ministry related to renewals of registration and the effective date of termination. In the Tribunal's opinion, the legislation is quite specific and this issue does not need to be dealt with further. At the dates of the first hearing and at the second hearing, Mr. Cohen was not registered under the Real Estate and Business Brokers Act.

The Evidence

Evidence on behalf of the Registrar was given by Cora de la Cruz who had been appointed acting Registrar effective November 2nd, 1987, William MacKinnon, John Twohig, former counsel for the Law Society of Upper Canada, Sergeant Michael Winbourne of the Metropolitan Toronto Police Force and Larry Foretsky, a Compliance Officer in the Ministry. Mr. Cohen gave evidence on his own behalf. Character evidence on his behalf was given by two of his co-workers Heather Tait and Helen Gould. Stanley Albert, the Branch Manager at Safeguard Real Estate Limited and Mr. Cohen's employer also gave character evidence, and evidence as to procedures in his branch office.

The evidence of Ms. de la Cruz was not very helpful to the Tribunal. She had not been involved in the original investigation, interview or proposal, and all her information

came from a review of the Ministry file. She had only been appointed to her position two days before her appearance before the Tribunal. This may account for the fact that on the date of her appearance - November 4th, 1987, she signed a computer activated letter addressed to Mr. Cohen advising him that his registration as a salesman had expired. She evidently did not recognize the name because she did not inform anyone either at the Ministry or the Tribunal that such letter had been sent. (From the evidence heard on December 16th, 1987, it appears to the Tribunal that the reason that the Ministry officials realized on November 10th, 1987, that Mr. Cohen's registration had terminated was because an application for renewal had been brought by him to the Ministry.)

Mr. MacKinnon outlined his investigation whereby he established Lawrence M. Cohen and Maurice L. Cohen were the same person, that Lawrence Cohen had been convicted, was in bankruptcy and had been disbarred. He also filed a record search of the Ministry of Transportation which showed that driver's licences had been issued to both Lawrence Cohen and Maurice Cohen and that there had been driving-related convictions registered. He also gave evidence related to the meeting between Mr. Coleclough and Mr. Cohen at which he had been present.

Mr. MacKinnon testified that when Mr. Cohen was first shown the application for registration dated September 1985 and asked why he had answered in the negative to questions 4, 5, 6 and 7, Mr. Cohen had replied that his eyes were not very good. However, Mr. Cohen, later in the meeting said that he had lied because prior to completing the application, he had telephoned the Registrar and had been told that there was no chance of registration for a disbarred lawyer and he felt this was contrary to the Bill of Rights. On cross-examination, it was Mr. MacKinnon's recollection that at the meeting, it was Mr. Coleclough's position that a disbarred lawyer who was recently convicted would not be registered. The disbarment alone was not sufficient ground to refuse registration. Mr. MacKinnon could not explain all the entries in Mr. Cohen's driving records. On cross-examination, Mr. MacKinnon stated that he had no specific authorization to make an inquiry into Mr. Cohen's background but that he had a general authority under the Act to make inspections.

Mr. Goretsky identified the Bankruptcy Certificate and Sheriff's Certificate which he had obtained, but he had no further knowledge related to either document.

Mr. Twohig testified that Mr. Cohen had been called before the Discipline Committee of the Law Society of Upper Canada after a number of complaints had been received. Mr. Cohen had not appeared before the Committee, however, his lawyer had filed an Agreed Statement of Facts in which Mr. Cohen denied misappropriation of funds but admitted that he was an undischarged bankrupt and had abandoned his practice. According to Mr. Twohig, Mr. Cohen did not object to his disbarment, and on September 21st, 1984, Mr. Cohen was disbarred for professional misconduct. The Agreed Statement of Facts filed with the Law Society was not available to the Tribunal.

Sergeant Swinbourne testified that he had made an investigation of Mr. Cohen's affairs after complaints were received from Mr. Cohen's former clients, alleging among other things misappropriation of funds and theft. On January 31st, 1984, Mr. Cohen was arrested and subsequently charged with eleven counts of fraud, theft and forgery. It was the officer's testimony, that Mr. Cohen had pleaded guilty to four charges and that on October 15th, 1986, he was sentenced to six months in jail and ordered to make restitution to the Law Society in the amount of \$42,000. The remaining charges were dropped.

According to Mr. Cohen's birth certificate, he was born in Toronto on September 1st, 1935. His registered name is Cohen, Maurice Lawrence. Mr. Cohen testified that he had been called to the Ontario Bar in 1962 and that his name on the Law Society Rolls was Lawrence Murence Cohen. He could not explain 'Murence'; however, he made no effort to correct the error. Until 1985, he was commonly known as Lawrence M. Cohen and was often called 'Larry'. He said that prior to 1985, he was never called Maurice. However, following the bad publicity related to his disbarment and conviction and the attendant difficulty in finding employment, he began using the names Maurice or Joe. As part of his new identity, he obtained a new driver's licence in the name of Maurice. Mr. Cohen said that he had allowed the licence in the name of Lawrence to lapse. This does not appear to coincide with the driving record filed, however as noted earlier, the entries on that exhibit were not fully explained and Mr. Cohen's evidence was not contradicted.

Mr. Cohen admitted that he had answered some of the questions on the September 1985 application in an inappropriate manner" but he felt that this was justified in the particular circumstances. When Mr. Cohen was taken through the document question by question, it was clear that eleven of

the answers were false. The circumstances to which Mr. Cohen was referring was the telephone call which he said he made to the Registrar, Real Estate and Business Brokers Act. He said that he had spoken to a person whom he believed to be the Registrar. It is not clear to the Tribunal what questions were actually put to the person on the telephone, but according to Mr. Cohen, he was told that as a general policy, no disbarred lawyer would be registered under any circumstances. Mr. Cohen said that he felt such a policy was inherently wrong, and after some serious thinking about the whole situation, he decided to complete the application in such a way as to deliberately mislead the Registrar as to his (Mr. Cohen's) past problems. He said that he felt he had to combat a system where there was a Registrar who was prejudiced against disbarred lawyers as a class. In short, Mr. Cohen decided that he had to lie in order to obtain registration and he did so.

Needless to say, when Mr. Cohen applied for a renewal of his registration on November 10th, 1987, he answered the questions on the application form truthfully.

Mr. Cohen said that after he had been called to the Ontario Bar, he had had a very busy and successful practice. However, in 1968, he had invested in a restaurant which failed in 1969. Because he had signed promissory notes in relation to that business, he was personally liable to the creditors. He decided not to declare bankruptcy but to attempt to pay off his creditors. It was his evidence that he was making payments of about \$50,000 a year on account of this indebtedness, however, by 1981, one of the creditors petitioned him into bankruptcy. According to Mr. Cohen, the major creditor in the bankruptcy was the Revenue Department for unpaid income tax. While the Tribunal has the Certificate of Bankruptcy, it does not know the total amount owing to the creditors or who they were. Nor does the Tribunal have the final report of the Trustee in Bankruptcy who has apparently been discharged. Mr. Cohen's evidence is that he thought he too had been discharged, but had never made any enquiries in this regard. He said he believes that he can obtain a discharge without difficulty.

The bankruptcy created another difficulty for Mr. Cohen. Pursuant to the regulation made under the Law Society Act, as a bankrupt, Mr. Cohen could not take money from a client or have a trust account for client's funds. This prohibition severely hampered his law practice. Mr. Cohen said he joined with another lawyer and that by using that lawyer's trust account and money orders, which he admitted was 'not entirely legal' as far as the Law Society was concerned, he

continued practising. He operated in this fashion until 1983 when the Law Society, after receiving complaints, began investigating Mr. Cohen's activities. According to Mr. Cohen, the lawyer, who was in some way associated with him, locked Mr. Cohen out of his office when the investigations of the Law Society and the police began. Mr. Cohen said he was left with only the files in his briefcase and he was, therefore, in no position to defend himself either before the Discipline Committee of the Law Society or against the criminal charges. It was for this reason that he did not object to his disbarment and that he pleaded guilty to four charges. The lawyer who allegedly locked Mr. Cohen out of his office was not called as a witness.

Mr. Cohen stated that some of the executions as listed on Exhibit 15 had been paid and some did not relate to him at all. In any event, in 1985, he thought that the bankruptcy had cleared the then existing debts. Of the six executions listed, three were filed in 1986 with the largest debt owing to the Law Society.

Aside from an anonymous letter (to which no weight was given), Mr. Cohen was not aware of any complaint made against him in his capacity as a real estate salesman. Mr. Cohen also gave some details of his community work since his release from jail.

During Mr. Cohen's examination by his counsel, he was asked whether his registration had been renewed. Mr. Cohen answered that it had.

Mr. Cohen's colleagues testified that he was well-liked and a good salesman. When Mr. Cohen was first employed by Mr. Albert, Mr. Albert was not aware of Mr. Cohen's past, nevertheless, now that all the facts are known, Mr. Albert said that he would continue to employ Mr. Cohen if the latter's registration was continued.

Counsel's submissions

Ms. Midanik, for the Registrar, argued that the basic allegations set out in the November Proposal had been proven and that under these circumstances, the Registrar's belief that Mr. Cohen's financial position, his demonstrated lack of honesty and integrity and his past breaches of the law, should disentitle him from registration, was reasonable. She, therefore, urged the Tribunal to order the Registrar to carry out her Proposal.

Ms. Bronstein, counsel for Mr. Cohen, although not agreeing with all the particulars of the allegations contained in the Proposal, did not dispute the basic facts. Nonetheless, she urged the Tribunal to order the Registrar to grant registration to Mr. Cohen.

Ms. Bronstein submitted that the Registrar, both in 1985 and again at the meeting with Mr. Cohen in 1987, showed a predisposition to refuse registration to all disbarred lawyers as a class and that the Registrar had not directed his mind to the particular circumstances of the particular individual and accordingly the Registrar had not complied with the requirements of Section 8 of the Act.

She also questioned the authority for and the propriety of Mr. MacKinnon's investigation. She submitted that the combined effect of the Registrar's apparent predisposition and the failure to comply with the requirements of the Act insofar as the investigation was concerned, amounted to a denial of natural justice for her client.

Ms. Bronstein then questioned whether Section 6(1)(a) and (b) of the Act had any application to a 'salesman'. In this regard, she pointed out, that both clause (a) and (b) speak of 'business' which is defined in the Act as follows:

"business" means an undertaking carried on for the purpose of gain or profit, and includes an interest in any such undertaking, and, without limiting the generality of the foregoing, includes a boarding house, hotel, store, tourist camp and tourist home;

She argued that only a broker carries on business and that a 'salesman' as defined in the Act is only an employee and does not carry on a business. Consequently, she said, the only applicable clause, insofar as salesmen were concerned was clause (d) of Section 6(1) which reads as follows:

the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

It was Ms. Bronstein's submissions that there were no allegations or proof that Mr. Cohen was carrying on activities in contravention of the Act.

Finally, Ms. Bronstein argued that if Section 6(1)(a) and (b) did apply to her client, then Mr. Cohen's total conduct should be taken into account - that he had attempted to pay off his debts prior to the bankruptcy, that he had 'paid his dues' to society with respect to his conduct as a lawyer, and that he had proven himself as a competent and honest real estate salesman. She argued, that given Mr. Cohen's belief that the registrar was biased, the false answers provided in the September, 1985 application could be justified. She submitted that Mr. Cohen had lied in order to survive in the face of clear bias. She also pointed out that although it was an offence to furnish false information under Section 50(1) of the Real Estate and Business Brokers Act, no charges had been laid against Mr. Cohen under that subsection.

Prior to the hearing, Ms. Bronstein served a Notice of Constitutional Question on the Registrar, whereby the constitutional validity of the application form, which Mr. Cohen had completed in 1985, was challenged. Specifically Ms. Bronstein argued that questions #4, 5, 6 and 7 on the application were in contravention of Section 15(1) of the Canadian Charter of Rights and Freedoms, which guarantees equality before the law and that question 7, which dealt with prior convictions or pending charges, was also in contravention of Section 11(d) and 11(h) of the Charter which guarantee presumption of innocence and prohibit double jeopardy in criminal proceedings.

It was her submission that the impugned questions as set out in the application were contrary to Section 15(1) of the Charter, firstly, because, in effect, they created different classes of persons and secondly, entitlement to registration depended on the class in which the individual found himself. Ms. Bronstein argued that this constituted discrimination which was not authorized in the Real Estate and Business Brokers Act itself and could not be justified. In support of her argument on this issue, she directed the Tribunal to the Divisional Court decision in Re: Aluminum Co. of Canada Ltd. and The Queen in right of Ontario 55 O.R. (2d) 22. She also cited Smith, Kline & French Laboratories Ltd. et al v. Attorney General of Canada 34 D.L.R. (4th) 584, a Federal Court decision.

On the issue of the breach of Section 11(d) and 11(h) of the Charter, Ms. Bronstein referred the Tribunal to a summary of a decision of the British Columbia Supreme Court, Waters et al v. Minister of Finance et al; a 1985 decision which dealt with a situation where an administrative penalty

was imposed under the provincial and federal Income Tax Act and subsequently charges were also laid with respect to the same offence.

Ms. Midanik took an opposing position on the constitutional challenges. With reference to the application of Section 11(d) and 11(h) of the Charter, she referred the Tribunal to a Court of Appeal decision in Re: Trumbley et al. and Fleming et al 55 O.R. (2d) 570 to support her contention that this section of the Charter had no application to the present circumstances. She also cited Schmidt v. The Queen et al. 33 C.C.C. (3d) 193 and Re: Petroleum Products Act 33 D.L.R. (4th) 680.

On the issue of class discrimination, Ms. Midanik submitted that no classes of applicants had been created as a result of the questions and that there was no discrimination within the context of Section 15(1) of the Charter. She said that there was no bad faith or ulterior motive behind the Real Estate and Business Brokers Act, that the legislation was reasonable, given the purpose of it, namely, to regulate an industry in order to protect the public. The questions contained on the application related directly back to Sections 6 and 8 of the Act and the factors to be considered by the Registrar. In essence, it was her contention that the onus imposed on the challenger had not been discharged and that if there was any discrimination, and she argued that there was none, it was justified. In support of her argument, she directed the Tribunal to the decision in Re: Andrews and Law Society of British Columbia 27 D.L.R. (4th) 600.

Conclusions

The Tribunal feels obliged to say at the outset that the case presented on behalf of the Registrar left many questions unanswered. The investigation made by the Registrar, while detailed in some instances, seems, at best, cursory in others. However, based on the evidence before it, the Tribunal finds that at the date of the hearing, Mr. Cohen was an undischarged bankrupt with several additional judgements still outstanding. He is a disbarred lawyer with convictions under the Criminal Code and the Highway Traffic Act registered against him. Although he has served his jail sentence, the restitution Order, which was part of the sentence, has not been complied with. The September, 1985 application was virtually a total fabrication from beginning to end. Mr. Cohen, as he himself admitted, lied for the sole purpose of misleading the Registrar as to Mr. Cohen's identity and background. Mr. Cohen

also misled the Tribunal when he told it that his registration as a salesman had been renewed.

The Tribunal makes no finding of a predisposition or bias on the part of the Registrar towards disbarred lawyers. Certainly the two Proposals before it show that a number of other factors were taken into account by the two Registrars including that Mr. Cohen was not entitled to registration as a real estate salesman.

On the issue of the constitutional validity of the application form, the Tribunal finds that the questions contained in the application do not offend sections 11(d), 1(h) or 15(1) of the Charter of Rights.

The onus of establishing that the law is discriminatory or that it treats individuals or classes of individuals unequally is on the person asserting it. In the Aluminum decision, the Court said:

The test to be applied in determining whether an impugned statutory provision is discriminatory is whether it is unfair or unreasonable, having regard to the purpose it serves and the effect it has on those who were treated unequally.

and further:

Section 15 only prohibits discrimination that is unfair or unreasonable, having regard to the purpose the impugned regulations serve and the effect they have on those who are treated unequally.

The questions challenged by Ms. Bronstein relate back to the factors or criteria set out in Section 6(1) of the Real Estate and Business Brokers Act whereby an applicant may be disentitled from registration. In the Andrews decision, the Court said:

Almost all statutes draw distinctions between individuals. It cannot be supposed that in all such cases the individuals' constitutional rights are infringed. To call every legislative distinction between people an infringement of S.15 is to trivialize the fundamental rights guaranteed by the Charter.

As in the Smith case, the categories or classes of individuals alleged to have been created by the questions in the application bear no relation to the categories enumerated in Section 15 of the Charter. While in some cases, the ultimate consequence may be that a person will not be registered under the Real Estate and Business Brokers Act, this is an economic consequence which does not affect liberty, freedom or human rights.

However, even if there can be said to be some unequal treatment (and we reiterate that we do not so find), the questions are reasonable given the purpose of the legislation which is to protect the public.

With reference to Question 7 on the application, the Tribunal is guided by the decision in Re: Trumbley which was quoted with approval by the British Columbia Court of Appeal in Re: Milton et al. and the Queen 37 D.L.R. (4th) 694. The British Columbia Court said:

Section 11 means exactly what it says: that is, that the applicability of the various paragraphs depend on whether the person has been charged with an offence. This is the gist of the judgement...in Re: Trumbley...

By no stretch of the imagination can Mr. Cohen be said to have been charged with an offence in these proceedings.

Mr. MacKinnon, in his evidence, stated that he had been designated under the Real Estate and Business Brokers Act to make inspections and so on, but that he had not been specifically authorized or appointed to make an inspection or investigation into Mr. Cohen's past conduct. There was no suggestion that Mr. MacKinnon had made an inspection or investigation into Mr. Cohen's activities as a real estate salesman of the the type contemplated by Sections 12, 13, 14 or 15 of the Act.

Mr. MacKinnon's inquiries related to Mr. Cohen's past conduct and activities as a lawyer and the information Mr. MacKinnon obtained was for the most part, of public record or public knowledge. The Tribunal does not find that, in making the inquiries that he did, that Mr. MacKinnon exceeded his mandate or that he acted without authority.

On the issue of the applicability of clauses (a) and

(b) of Section 6(1) of the Act to persons applying for registration as a real estate salesman, the Tribunal notes that Section 6(1) begins: "An applicant is entitled...." Had the Legislature intended clauses (a) and (b) to apply only to persons wishing to be real estate brokers, it would have been a simple matter to have drafted the legislation accordingly. The definition of 'business' encompasses employment by the words 'an undertaking carried on for the purposes of gain or profit'. Ms. Bronstein's argument on this matter is therefore rejected and the Tribunal finds that Section 6(1)(a) and (b) applies to both persons applying to be real estate brokers and those applying to be real estate salesmen.

The Tribunal has carefully considered the evidence presented to it and has made its finding of fact. While Mr. Cohen may have had an honest belief that the then Registrar had a predisposition against disbarred lawyers, his action in completely falsifying his application in 1985 is inexcusable. The Tribunal does not agree with Ms. Bronstein that Mr. Cohen has 'paid his dues' to society by the fact that he served his jail sentence. The other part of his sentence, namely the Order for restitution remains outstanding. While the Tribunal notes that Mr. Cohen is now involved in some community work, this restitution Order must be cleared. Similarly, Mr. Cohen must obtain his discharge from bankruptcy. When these two matters have been dealt with, the Tribunal is satisfied that Mr. Cohen will be entitled to registration as a real estate salesman.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out her Proposal and to grant registration provided the Applicant has fully complied to the satisfaction of the Registrar with the restitution Order made by Judge N.D. Coe on October 15th, 1986, and has obtained his discharge from bankruptcy. These requirements are conditions precedent to the registration of the Applicant. If the Applicant fails to satisfy these conditions on or before June 30th, 1988, the Registrar is ordered to carry out his Proposal to refuse to register the Applicant.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar, Real Estate and Business Brokers Act. The appeal had not been concluded at the time of this publication.

JAMES LESLIE DOWNEY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
WILLIAM J. BINGLEY, Member

APPEARANCES:

DARCEY McKELVEY, representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 5 May 1988

Toronto

REASONS FOR DECISION AND ORDER

The Registrar of Real Estate and Business Brokers has issued a Notice of Proposal to refuse the registration to this Applicant on the basis that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Applicant has applied for registration as a salesman pursuant to the Real Estate and Business Brokers Act, R.S.O. 1980, c. 431 (the "Act"). The Notice of Proposal cites the Applicant's fairly lengthy record of criminal convictions, which record was fully disclosed by the Applicant in his application for registration dated October 8th, 1987, as one reason for forming the opinion that the Applicant will not carry on business in accordance with law and with integrity and honesty. The second reason cited in the Notice of Proposal is that in respect of question 4(b) on the application form which reads:

Have you ever had a licence or
registration of any kind, refused,
suspended, revoked or cancelled?

the Applicant answered "No" when in fact he had had his driver's license suspended. With respect to this second reason, the Tribunal accepts the Applicant's evidence that he misunderstood the question. Although he did not properly

answer question 4(b), he did not attempt to conceal the suspension of his driver's license since his application clearly refers to his conviction of the offence of "drive under suspension".

The Applicant is now 29 years of age. In 1977 when the Applicant was 18 years of age, he was convicted of "theft under" and fined \$30.00. The offence itself took place when the Applicant was 16 years of age. The Applicant indicates in the application that he "was with a friend when he stole a pair of shoes". There are a number of other convictions in 1977. Two of these are drug related offences, two relate to failure to comply with terms of probation, and one is a conviction of dangerous driving. In 1980 the Applicant was again convicted of a drug related offence and a charge of dangerous driving. In 1982 the Applicant was convicted of causing a disturbance and escaping lawful custody for which he received a \$50 fine, a suspended sentence and probation term. In the same year, the Applicant was convicted of break and enter and extortion. These offences were drug related in that the Applicant had accompanied a friend who was trying to collect a drug related debt from a third party. The Applicant received a sentence of seven months incarceration. In 1983, there are two further convictions of possession of narcotics and finally in 1986 the Applicant was convicted of driving while under suspension and mischief arising out of a single incident. All of the offences were committed one and a half to two years prior to the convictions.

The Tribunal heard brief evidence from Mrs. Noreen Talbot, an Administrative Officer with the Registrar's office and the only witness called by the Registrar. She indicated that the Registrar was concerned with the nature of some of the Applicant's convictions in view of the fact that the Applicant would, as a real estate salesman, have access to vendors' homes, thus presenting a potential risk to the public. She indicated that the Applicant's demeanor throughout her dealings with him was one of total co-operation and full disclosure.

The first witness called on behalf of the Applicant was Mr. Don Miles, a registered real estate broker with Century 21 Real Estate in Brampton, Ontario. He has known the Applicant for some 15 years and is prepared to employ him. Mr. Downey has already completed a four week in-house training program at Century 21. Mr. Miles indicated that he was confident that Mr. Downey would "make good and turn his life into a productive and law-abiding one". He was prepared to insure that Mr. Downey received adequate supervision from the brokerage and was prepared to have Downey teamed with another

agent or agents for a probationary period. Mr. Miles was forthright in admitting that the fact that Mr. Downey would have access to people's homes presented a legitimate concern in considering his application for registration.

The next witness called on behalf of the Applicant was Brian Wheeler, operator of the Blind Shoppe Inc., who is Mr. Downey's present employer. Mr. Downey has been a blind and window covering installer for this business for approximately two years. In that capacity, he has dealt with the public and has had access to people's homes. Mr. Downey has worked alone most of the time, and together with another installer on larger jobs. Mr. Wheeler has known Mr. Downey for some 20 years. During the period of his employment with the Blind Shoppe Inc., no problems or complaints about Mr. Downey have arisen. Mr. Wheeler described the Applicant as a positive, happy person who was willing to work hard and who he felt deserved a second chance. Mr. Wheeler also indicated that he trusted the Applicant enough to leave him to care for the business when he was away on vacation.

The Applicant gave evidence that he is now the father of a 2 1/2 year old child and is engaged to be married to the child's mother. He has successfully completed the five week training course at Sheridan College that is a requirement for registration as a real estate salesman. He enjoyed his training period with Century 21 and believes that he would find a career as a real estate agent fulfilling. To a large extent, his criminal convictions have stemmed from his association with drugs and drug users. He does not use drugs now and has not used drugs since October 1983. He testified that he now has a different social attitude largely due to the fact that he has a family and wants to build a future for them. He has never had any problems with any of his jobs. Prior to his present employment, he was unemployed for a period of time due to a car accident. Prior to that, he was employed for two years with a printing company and for two years prior to that with another printing company. His driver's license is not currently under suspension. He is prepared to comply with any terms that might be imposed upon him, such as being teamed with other agents, etc. The Applicant impressed the Tribunal as having a strong work ethic and a sincere and strong desire to turn his life around.

The Tribunal's first and foremost concern in considering a possible registration under the Act must be and is the protection of the public interest. The question to be considered in this instance is whether Mr. Downey's registration as a real estate salesman would create a real risk

to the members of the public with whom he would be dealing in that capacity. The Tribunal after carefully considering all of the evidence and observing the demeanor of the Applicant on the witness stand is of the view that it is unlikely that Mr. Downey will present a risk to the public. In arriving at this conclusion, the Tribunal has taken into consideration the nature of the convictions in question. The majority were drug related, including the break and enter and extortion offences which are of serious concern to the Tribunal. The Tribunal accepts Mr. Downey's evidence that he no longer uses drugs and has not used drugs since October 1983. It is therefore improbable that there will be a recurrence of unlawful activities by the Applicant. It is also to be noted that, with the exception of the initial conviction of theft under in 1977 relating to a shoplifting incident that occurred when Mr. Downey was only 16 years of age, there is no record of any theft, fraud or similar offences. As well, with the exception of the driving under suspension and mischief conviction in January of 1986, Mr. Downey has not had any convictions since October of 1983, with the offences themselves occurring some time earlier. Another factor which was taken into consideration by the Tribunal is Mr. Downey's youthfulness at the time that he committed the offences. He now appears to have matured into a responsible adult with family obligations. Mr. Downey has demonstrated that he is capable of keeping himself gainfully employed. During the past two years with his current employer, he has had a good work record and has dealt with the public, including working in people's homes, without incident or complaint. To the Applicant's credit, Mr. Downey's employer has trusted him enough to allow him to care for the business while he was on vacation.

While the Registrar has proposed to refuse this registration in the formal Proposal before the Tribunal, the representation on behalf of the Registrar at the hearing was not one of strong opposition to the Applicant's registration, but rather a recommendation that appropriate supervisory terms and conditions be attached to the registration. Counsel for the Registrar referred the Tribunal to a decision of this Tribunal dated August 19th, 1987, namely Arlotta and Registrar of Real Estate and Business Brokers. There, in factual circumstances similar to those now before the Tribunal, registration was granted to the Applicant subject to supervisory terms and conditions. The Tribunal finds that a similar order should issue in this case.

In result, the registration of the Applicant shall be allowed subject to the terms and conditions set out in the formal Decision and Order issued by the Tribunal herewith.

FIRST CANADIAN REALTY LTD.
VITO CAMPANALE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
ROLAND C. BRENNING, Member

APPEARANCES:

VITO CAMPANALE, appearing on his own behalf

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATES OF

HEARING: 19, 20 July 1988

Ottawa

REASONS FOR DECISION AND ORDER

This hearing was instituted at the request of First Canadian Realty Ltd. and Vito Campanale, a broker registered under the Real Estate and Business Brokers Act.

The purpose of the hearing was to consider whether the Tribunal should direct the Registrar of Real Estate and Business Brokers to carry out his Proposal as set out in his Notice of Proposal dated December 30th, 1986 (Exhibit 12) or whether the Tribunal should direct the said Registrar to refrain from so doing and to take some other action in accordance with the said Act and Regulations thereto.

The Proposal to revoke the registration of First Canadian Realty Ltd. and Vito Campanale as real estate brokers arose as a result of an inspection carried out on behalf of the Registrar, Real Estate and Business Brokers Act.

The reason cited in the Notice of Proposal for revoking the registration of First Canadian Realty Ltd. and Vito Campanale is that the past conduct of the sole officer or director of First Canadian Realty Ltd., namely Vito Campanale, affords reasonable grounds for belief that the business of the company will not be carried on in accordance with law, and with integrity and honesty within the meaning of Section 6 of the Act.

The hearing lasted for a day and a half, and numerous documents were filed. The evidence will be summarized briefly in these Reasons; however, all of the testimony and the Exhibits were carefully considered in reaching a decision.

On December 17th, 1984, Vito Campanale caused to be incorporated First Canadian Realty Ltd. The corporation has been registered as a real estate broker since January 24th, 1985 and on February 28th, 1985, Campanale himself became registered as a real estate broker for First Canadian Realty Ltd. As the sole director, officer and shareholder of the said company, Mr. Campanale has been and still is the directing mind and will of First Canadian Realty Ltd. Prior to being registered as a broker, Mr. Campanale was a salesman in real estate from January 1983.

The inspection carried out on behalf of the Registrar, was undertaken by Mr. Randal Reese, who was then employed as an investigator of business practices.

Mr. Reese testified that in the Spring of 1986, in order to carry out the inspection, he came to the offices of First Canadian Realty Ltd. in Ottawa and, while there, checked its books and records and interviewed staff of the company as well as others. As a result of the inspection, it was determined that the company had employed one Stephen Ramsay as a real estate salesman at the end of October 1985, when the said Stephen Ramsay had not been registered as a real estate salesman by the Registrar under the Act.

By reason of the findings of the investigator, prosecution proceedings for contraventions of the Act were instituted against First Canadian Realty Ltd., Mr. Ramsay, and Mr. Vito Campanale pursuant to Section 50(3) of the Act. First Canadian Realty Ltd. and Vito Campanale were each charged with one count of employing an unregistered salesman and ten counts of paying a commission to an unregistered salesman.

The Judgment (Exhibit 15) rendered by Coulter, J. on January 13th, 1988 found First Canadian Realty Ltd. and Vito Campanale guilty on all counts. The Judgment concluded that there was no doubt that Stephen Ramsay was working as a real estate salesman for the company, the whole in breach of the Act. The Judgment listed the ten occasions on which the Company knowingly paid an illegal commission to Mr. Ramsay, upon the direction of Mr. Campanale.

The Court ordered Mr. Campanale to pay a fine of

\$1,000 on the first count and a fine of \$500 for each of the succeeding counts - making a total fine of \$6,000. The company was fined \$500 on the first count and \$250 on each succeeding count - making a total fine of \$3,000.

It is in evidence that the total fines of \$9,000 have been paid.

Mr. Reese presented to the Court four schedules which he drafted, based on the records of First Canadian Realty Ltd. All schedules were deposited as Exhibit 16. Schedule A listed the properties in which Stephen Ramsay was involved; Schedule B listed the trades that Stephen Ramsay carried out while unlicensed; Schedule C listed the commissions paid to Stephen Ramsay; and Schedule D listed the cheques paid to Stephen Ramsay from the First Canadian Realty Ltd. general account.

Mr. Reese testified that in many instances payments to Mr. Ramsay were made by cheques payable to cash and an account entitled "Special Reserve Account" was set up to account for such payments. The effect of this was to make it impossible to perceive that Mr. Ramsay had been paid a commission, unless one verified the endorsement on the back of each cheque.

Mr. Reese also deposited as Exhibit 18 trade record sheets which named Mr. Stephen Ramsay as the person responsible for a sale or rental on which a commission was payable.

Ms. Heather Loppe testified next. She was a real estate broker for First Canadian Realty Ltd. at the time that Ramsay was engaged by the company. She was hired by Mr. Campanale to act as the manager of the office until she left in May 1986.

Ms. Loppe testified that Mr. Ramsay received commissions as a salesman while not licensed. She stated that Mr. Campanale directed her to pay Mr. Ramsay these commissions by way of cheques payable to cash and posted to the "Special Reserve Account". It is to be noted that Mr. Campanale is a chartered accountant with a good understanding of financial records and financial record keeping.

Ms. Loppe testified that she did not approve of Mr. Ramsay and indicated her displeasure to Mr. Campanale. He, however, was willing to retain Mr. Ramsay because of the sales he was generating. She also stated that when the inspection by the Registrar began, she was directed by Mr. Campanale to add her name to all the trade record sheets in which Mr. Ramsay's

name appeared alone. Ms. Loppe did, in fact, add her name to all such listings.

Ms. Loppe testified that during the period from the beginning of her employ until February, Mr. Campanale was basically operating out of his office in London, Ontario and was rarely at the office in Ottawa. Despite his absence, Ms. Loppe did not feel she had enough authority to run the office properly.

When Mr. Ramsay failed to receive his salesman's licence, Mr. Campanale asked Ms. Loppe to prepare a final reconciliation (Exhibit 24) in which a final accounting was rendered to Mr. Ramsay of the commissions earned.

Mr. Campanale, in his testimony, acknowledged that Mr. Ramsay had received commissions, but he denied any attempts to hide such payments.

Mr. Campanale stated that he accepted the findings of the Provincial Court that he and his company had employed a salesman who was not registered, viz., Mr. Ramsay. Mr. Campanale admitted he erred in hiring Mr. Ramsay when he was not yet registered. He stated categorically that he had learned his lesson the hard way and would never again hire an unregistered salesman or, take any action of a doubtful nature without first ascertaining that it fell within the provisions of the Act.

Mr. Campanale also testified that he spent almost all his time in London during the period Mr. Ramsay was employed. He depended on others to carry out the various managerial functions without offering them supervision.

Mr. Campanale stated that since the initial inspection, his company and himself had been audited four times by the Registrar without any complaints being laid against him.

Mr. Burton informed the Tribunal that no findings of irregularities in the financial operation of the company were found with respect to dealings with the public and administration of trust accounts.

The final witness was Ms. Jacqueline Laurin, a real estate broker since 1979. She worked at First Canadian Realty Ltd. while Ramsay was in its employ.

She felt that Ms. Loppe did not control the office

properly. As for Mr. Campanale, she said that he always conducted his business with honesty and integrity, and that former clients had nothing but good things to say about him.

From the evidence and testimony presented to it, the Tribunal finds as follows:

1. Mr. Campanale and First Canadian Realty Ltd. did in fact pay commissions to Mr. Stephen Ramsay knowing at the time of such payment that they were illegal and in breach of the Real Estate and Business Brokers Act since they knew that Mr. Ramsay was not registered as a salesman under the said Act.
2. Mr. Campanale tried to disguise the occurrence of the illegal payments by issuing payment to Mr. Ramsay through cheques payable to cash, and by establishing the "Special Reserve Account" in which Mr. Ramsay's name did not appear.
3. He attempted to further obscure the nature of the payments and of the activities of Mr. Ramsay by having Ms. Loppe add her name to the Trade Record Sheets (Exhibit 22) and by having her prepare a letter, dated February 27th, 1986, which purported to describe the nature of Mr. Ramsay's functions. This letter, which was self-serving, did not reflect the full scope of Mr. Ramsay's activities, which included acting as a salesman.
4. Mr. Campanale failed to properly supervise and administer the activities of the office in Ottawa. He was more interested in generating real estate commissions than in assuring that the affairs of his business were run in such a manner as to satisfy the provisions of the Real Estate and Business Brokers Act.

Mr. Burton has argued that the conviction of Mr. Campanale and First Canadian Realty Ltd. of the offence of

hiring a salesman without a licence was in itself sufficient to justify the belief that Mr. Campanale could not reasonably be expected to carry on business in accordance with law, and with integrity and honesty. He further argued that the elaborate bookkeeping, whose effect was to obscure the real activities of Mr. Ramsay, further demonstrated that Mr. Campanale and his company would not carry on business in the future in accordance with law, integrity and honesty.

In the case of Vito Luigi Calogero (1987) 16 C.R.A.T. 206 at 211, it was held: "The onus is on the Registrar to satisfy the Tribunal that the provisions of Section 6 prevail."

Unless the Registrar can satisfy the Tribunal that Mr. Campanale cannot reasonably be expected to carry on in the future his business with integrity and honesty, or that the nature of his activities will be such as to prejudice the public, the Tribunal will not allow the revocation of his registration. To do so, would be to deprive the Applicant of the ability to earn his livelihood.

The primary purpose of the Real Estate and Business Brokers Act is the protection of the interests of the public. In this regard, we note that neither Mr. Campanale nor First Canadian Realty Ltd. has been charged with any financial irregularities, misadministration of trust funds, or complaints by the public with respect to breaches under the Real Estate and Business Brokers Act.

In reality, the source of all of Mr. Campanale's problems relate to the illegal activities of Mr. Ramsay. In paying Mr. Ramsay commissions when he was not registered as a salesman under the Act, Mr. Campanale and his company First Canadian Realty Ltd. committed serious breaches of the Real Estate and Business Brokers Act. But Mr. Campanale and his company were punished for these breaches by virtue of the prosecution before the Provincial Offences Court. They were condemned to pay a total of \$9,000 in fines, plus substantial legal fees. In addition to these fines, are Mr. Campanale and First Canadian Realty Ltd. also to have their registration revoked? Were their violations sufficient to justify the belief that they will not in the future carry on business in accordance with law, and with integrity and honesty?

The Tribunal does not believe that these violations are of sufficient gravity to conclude that Mr. Vito Campanale and First Canadian Realty Ltd. should have their registration revoked. In this connection, we refer to the sentencing by

Judge Coulter on January 13th, 1988. The fines he assessed were relatively light, given the maximum fines that could have been assessed. More particularly by virtue of section 50 of the Real Estate and Business Brokers Act, Mr. Campanale could have been fined \$2,000 for each of the offences, together with a term of one year while the corporation could have been fined \$25,000 for each of its offences.

In determining the fine, Judge Coulter stated at page one of his Judgement, "We are not talking here about life or limb being placed in jeopardy."

In the Tribunal's opinion, Mr. Campanale was punished for his violations under the Real Estate and Business Brokers Act and can be expected to not repeat any such violations in the future. The public would not be properly served by revoking the registration of Mr. Campanale and First Canadian Realty Ltd.

The Tribunal, however, is concerned by Mr. Campanale's failure to provide adequate supervision and management of First Canadian Realty Ltd. This, in part, accounted for many of Mr. Campanale's problems. With proper management, breaches of the Act could have been avoided. To assure that the Applicants carry on business in the future in accordance with law, and with integrity and honesty, Mr. Campanale must engage a qualified manager.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers, the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke the registrations of Mr. Vito Campanale and First Canadian Realty Ltd., the whole subject to the following terms and conditions:

1. The Applicant shall engage within three months a broker-manager acceptable to the Registrar of Real Estate and Business Brokers to carry out the day-to-day management and administration of the applicant corporation, First Canadian Realty Ltd., in accordance with the provisions of the Real Estate and Business Brokers Act;
2. The mandate of the said broker-manager shall be for a term of not less than two years;

3. The broker-manager shall issue a report to the Registrar once a month for the first three months and thereafter once every three months in which he will attest that the management of the applicant corporation has been in accordance with the provisions of the Real Estate and Business Brokers Act and that he has had the required autonomy and authority to carry out his functions;
4. In the event of any breach by either Applicant of the present conditions or of any other breach of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

FOCUS REAL ESTATE INC.
HENRY MICHAEL SENYK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOSEPH STRUNG, Member

APPEARANCES:

HENRY MICHAEL SENYK, appearing on his own behalf
and as agent for Focus Real Estate Inc.

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers.

DATE OF

HEARING: 1 February 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Focus Real Estate Inc. and Henry M. Senyk were registered as brokers under the Real Estate and Business Brokers Act on March 2nd, 1987, on terms and conditions imposed by the Registrar. These were accepted by Mr. Senyk. One of the conditions was that one Vladimir Baotic would not be associated with or have an interest in Focus Real Estate Inc. The Registrar imposed this condition because the registration of Mr. Baotic and Focus Realty Limited, under the Real Estate and Business Brokers Act had been revoked after a hearing before this Tribunal on December 3rd, 1986 (see Reasons for Decision 15 C.R.A.T., 176).

On October 15th, 1987, a routine inspection was carried out by an investigator with the Ministry to determine whether Mr. Senyk was complying with the terms and conditions of registration. The investigator found that they were not.

Specifically Mr. Baotic was the lessor of the premises occupied by Focus Real Estate Inc. and in fact had an office which appeared to be part of the premises leased. In addition, Mr. Baotic's business card, representing him as a broker with Focus Realty Limited was displayed as was a listing of sales personnel of Focus Real Estate Inc. which showed Mr. Baotic's

name at the head of the list and Mr. Senyk's well down. Further investigation showed that Mr. Baotic had been involved in showing a residence at 21 Elmore Drive, Hamilton and in preparing an Agreement of Purchase and Sale for that property.

As a result of the investigation, the Registrar proposes to revoke the broker's licence of both Mr. Senyk and Focus Real Estate Inc. on the basis that the past conduct of Mr. Senyk, an officer and director of this corporation affords reasonable grounds for belief that the business of both would not be carried on in accordance with law and with integrity and honesty.

Testimony on behalf of the Registrar was given by Noreen Talbot, who had drawn up the terms and conditions of registration which were agreed to by Mr. Senyk; Brian Prendergast, who carried out the investigation at the office of Focus Real Estate Inc.; and Richard Perry, one of the purchasers of the Elmore property.

Mr. Perry testified that the Elmore house had been shown by Mr. Baotic and that he, Mr. Baotic, had signed as witness on the Agreement of Purchase. He was particularly certain of this because he had commented on the illegibility of the signature to Mr. Baotic. Mr. Perry said he had never met Mr. Senyk.

Mr. Senyk testified that at the time the Perrys' requested a showing of the Elmore property he was ill and that Mr. Baotic had shown the property. Mr. Senyk said that he had signed the purchase agreement as a witness but not in the presence of the Perrys'. He said that his signature was so poor because he was suffering from arthritis in his fingers at the time and could not hold a pen properly. He explained that the personnel list was an old list which had been replaced.

Mr. Senyk said that he had been approached by Mr. Baotic to open a real estate office in the name of Focus Real Estate Inc. and to apply for a broker's registration. He stated that aside from the one incident, Mr. Baotic had not been involved in the business in any way other than as lessor of the office space which had previously been occupied by Focus Realty Limited. He also testified that although he knew Mr. Baotic's registration had been revoked, he didn't know why. He said he had been fooled by Mr. Baotic.

Mr. Senyk said he regretted getting involved with Focus Real Estate Inc. and Mr. Baotic and only wished to wind

up that office and to continue working as a real estate broker in his own name.

The Elmore incident may have occurred by happenstance but Mr. Senyk showed a lack of judgment, given the terms and conditions imposed on his broker's registration in allowing Mr. Baotic to show the Elmore property to the Perrys' and to act in all respects as the real estate salesman. There is also a lack of judgment in sharing in effect office space with Mr. Baotic. The Tribunal, on the facts before it, is led to the conclusion that Mr. Senyk was a willing victim - perhaps 'dupe' is a better word, of Mr. Baotic's scheme to continue in the real estate business even though the latter's registration had been revoked by the Registrar.

Mr. Senyk did not comply with all the terms and conditions imposed by the Registrar. He also, in the Tribunal's opinion, lied about his involvement with the Agreement to Purchase of the Elmore property. On the other hand, Mr. Senyk has had an unblemished record as a real estate salesman, sole proprietor and associate broker since 1954, and this should be taken into account in assessing his future conduct.

The Tribunal has no hesitation in directing the Registrar to carry out her Proposal to revoke the registration of Focus Real Estate Inc. However, the Tribunal believes that a suspension of Mr. Senyk's registration as a broker for a period of three months is sufficient to insure that in future, he will carry on business in accordance with law and with integrity and honesty.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out her Proposal against Focus Real Estate Inc., and to suspend the broker's licence of Henry Michael Senyk for a period of three months commencing on a date to be determined by the Registrar.

CYNTHIA HAYES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
MAURICE LAMOND, Member

APPEARANCES:

CYNTHIA HAYES, acting on her own behalf

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 17 November 1988

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Applicant Cynthia Hayes from the Proposal of the Registrar under the Real Estate and Business Brokers Act to refuse her registration as a real estate salesman on the basis of Section 6(1)(b) of the Act, in that her past conduct affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty.

The uncontradicted evidence submitted to the Tribunal revealed that the Applicant had a number of criminal convictions during the period 1973 to 1982. The evidence also showed that the Applicant has made three applications under public protections acts for registration: two under the Motor Vehicle Dealers Act and the application which is the subject of this appeal under the Real Estate and Business Brokers Act.

The first application under the Motor Vehicle Dealers Act was dated February 26th, 1974 and was received by the Ministry on March 4th, 1974. In response to question 7(a) of the application in respect to previous criminal convictions, the Applicant answered "No" in spite of the fact that convictions had been registered August 20th, 1973 and November 1st, 1973. The Applicant was granted registration under that Act on March 7th, 1974. That application was terminated on April 5th, 1974.

A second application under the Motor Vehicle Dealers Act was dated July 1st, 1975 and filed with the Ministry on July 3rd, 1975. Again the answer to question 7(a) was in the negative. It appears that Miss Hayes attended at a meeting in July 1975 in which the matter of the false answers in the two applications was discussed, and a formal letter dated August 1st, 1975, was sent to her confirming the advice given that she must be truthful in any future application.

The application under the Real Estate and Business Brokers Act was dated March 15th, 1988 and was received by the Ministry on March 18th, 1988. In answer to question 4(a) as to previous registration under certain Acts listed on the first page of the application, one of which is the Motor Vehicle Dealers Act, the Applicant answered "No". In response to question 7 as to previous convictions, the Applicant also answered "No", notwithstanding that in addition to the two convictions referred to above, two additional convictions had been recorded: February 3rd, 1976 and March 24th, 1982. Again a meeting was held with Miss Hayes in May 1988 in which she indicated that in respect to the convictions, she thought a pardon was automatically given after five years. Miss Hayes tendered in evidence an application for pardon submitted to the Federal Clemency and Pardons Division November 2nd, 1988. No result of this application was given to this Tribunal, nor was any explanation given for the delay from May when she learned that pardons were not automatically given until November in submitting such application.

The Tribunal notes that there may have been a reasonable explanation for the convictions and in fact, there may have been extenuating circumstances in regard thereto. Furthermore if a pardon is given, Miss Hayes will not have to make reference to such convictions. The Tribunal is nevertheless deeply concerned and distressed at the failure of Miss Hayes to respond truthfully to the questions in the applications under the Motor Vehicle Dealers Act and most recently under the Real Estate and Business Brokers Act. In particular, the latest application, in the opinion of the Tribunal, revives the false statements made by the Applicant in 1974 and 1975, and indicates a continuing lack of honesty and integrity in her recent past conduct sufficient for the Registrar to refuse her registration on the basis of Section 6(1)(b) of the Act.

This Tribunal was referred to the principles established by the Divisional Court in the Richard G. Brenner case in April 1983 and is governed by such principles; namely

that the Tribunal should only refuse "to direct the Registrar to carry out [the Registrar's] proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty" [emphasis added].

The evidence before the Tribunal clearly indicates that the Registrar considered the Applicant's past conduct in respect to the false answers in the application and this was fully admitted before this Tribunal. The Tribunal, therefore, cannot conclude that the Registrar was in error in refusing to register the Applicant.

Notwithstanding, the Tribunal would advise the Applicant that if she wishes to pursue a career in real estate, Section 10 of the Act permits a further application and, as was noted by the Divisional Court in the Brenner case, the Registrar or a tribunal in the future may very well determine that more recent past conduct at that time would permit a different conclusion to be reached than has been made at this time.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MICHAEL KEOGH

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
GEORGE J. CORMACK, Member

APPEARANCES:

PAUL G.M. HERMISTON, representing the Applicant

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 1 December 1988

Toronto

REASONS FOR DECISION AND ORDER

Michael Patrick Keogh is a registered real estate salesman employed by a firm known as Blue Jay Real Estate Corporation in Barrie, Ontario which is owned by brokers Marjorie Whaley and John Young. He had submitted an application for registration as a salesman under the Real Estate and Business Brokers Act on January 8th, 1988, and based on the information contained in the application, registration was granted on February 3rd, 1988.

Subsequently, Mrs. Whaley received a letter from a Mr. Rioux, apparently a disgruntled landlord of Keogh's, to the effect that Keogh had a criminal record. The letter was a copy of one Rioux had directed to the Barrie District Real Estate Board. The information disclosed in the letter did not coincide with that on Keogh's application for registration and resulted in a meeting between Mrs. Whaley, Mr. Keogh and Messrs. Kavanagh and Talbot of the Registrar's office.

The motives of Rioux are neither clear, nor are they material to this Tribunal's consideration of the matter, but in evidence Keogh said that Rioux had tried to use the information to gain an advantage over him. The meeting concluded with Keogh being advised that the Registrar would issue a Proposal to revoke his licence.

The criminal convictions which came to light as a result of the Rioux letter are as follows:

<u>Date</u>	<u>Charges</u>	<u>Disposition</u>
11/19/85 North Bay Ontario	Public Mischief Sec 128 (c) Criminal Code	Fined \$300 in default 21 days
01/22/86 Barrie Ontario	Obstruct justice Sec 128 (2) Criminal Code	Fined \$1000 in default 30 days prob for 1 year
01/07/87 Barrie Ontario	(1) Break Enter & Theft Sec 306(1)(B) Criminal Code (3 charges) (2) Break & Enter With Intent Section 306(1)(A) Criminal Code	(1-2) 6 months on each charge to be con- currently & probation for 2 years

Offences under the Highway Traffic also undisclosed appear to be:

(suspensions "for example")

October 13, 1981	Unpaid Fine
June 3, 1983	Unpaid Fine
June 17, 1985	Unpaid Fine
September 3, 1987	Unpaid Fine

(convictions)

June 27, 1979	Speeding
July 5, 1979	Speeding
April 29, 1981	Speeding
March 10, 1983	Driving without Valid Permit
April 18, 1983	Speeding
February 10, 1985	Speeding
February 22, 1985	Failure to surrender
February 22, 1985	Driving while suspended

The evidence of Mr. Kavanagh for the Registrar leads us to the conclusion that probably registration would not have been granted to the Applicant if he had disclosed his record of offences. That is supported by the evidence of Keogh who testified he had called the Registrar's office to ascertain whether or not, someone with a record of convictions could be registered and was advised that he could not be. He did not, however, know to whom he had spoken.

The Registrar now asks this Tribunal to sustain his Proposal to revoke the registration of Keogh on two grounds; the first being the failure to disclose the record on his application thereby providing false information and the criminal record itself which the Registrar contends "affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty" as contemplated by Section 6(1)(b) of the Act.

At the opening of these proceedings, Mr. Hermiston, counsel for Mr. Keogh, admitted the record in toto and further admitted the Applicant had given false information to the Registrar. The Tribunal therefore accepts these as facts requiring no further proof.

Tempering this evidence on the other hand, five witnesses were called to give character evidence on behalf of Mr. Keogh. Each of these was most impressive, and we consider honest in the impression Mr. Keogh had made on them. Mr. Stan Desroches, a probation officer for 13 years, had been Keogh's probation officer and had known him for two years. He stated he believed the Applicant to be of good character and a man who should be respected by the community. He had recommended to the Court the termination of Keogh's probation which was granted.

A bank manager, Mark Reynolds and a lawyer Michael Shain believed Keogh would never risk committing an offence again and returning to jail. Both of these men, well established in the business and legal worlds, were of the opinion the Applicant had been completely rehabilitated and would never again offend society.

The most impressive evidence, however, was given by Mrs. Whaley (and Mr. Young corroborating it), the brokers with whom Keogh was employed. They pointed out they would continue to employ him with implicit trust.

Mr. Hermiston, counsel for Keogh, argued strenuously and with sincerity on behalf of his client suggesting that although the Applicant had been wrong, his behaviour was dictated largely by the circumstances in which he found himself. It is to be noted that the Tribunal has been deeply impressed by both the character evidence and Mr. Hermiston's argument.

We are, however, not persuaded that were he to find himself in further difficulties, Mr. Keogh would not resort to

extreme means to gain his ends. He is a man in a hurry and this may be corroborated by his 12 convictions under the Highway Traffic Act. His overpowering desire to succeed, though not a fault, can at times lead to mistakes. We consider, however, that a suspension of his registration may be a tempering factor and an enduring lesson for a man of his age.

The Tribunal, therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, directs the Registrar to refrain from carrying out his Proposal, but hereby suspends the registration of the Applicant for a period of nine months commencing on the 30th day of December next.

SUSANNE L. KING

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW OR REVOKE THE REGISTRATION
TO REFUSE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
JAMES A. CATHCART, Member

APPEARANCES:

SUSANNE L. KING, appearing on her own behalf
(and then withdrawing)

S.P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 28 January 1988

Toronto

REASONS FOR DECISION AND ORDER

Susanne King, the Applicant herein, was first registered as a real estate salesperson under the Real Estate and Business Brokers Act on June 7th, 1983. Her last registration was for a two year period, which according to Ministry records would have expired on June 7th, 1987, unless pursuant to Section 13(1) of Ontario Regulation 891 "...an application for renewal of registration...together with the appropriate fee...is filed with the Registrar prior to the date of expiry."

The testimony of Noreen Talbot, an administrative officer with the Ministry, which was uncontradicted, was that Ms. King had appeared in person at the Ministry offices on June 17th, 1987 with her application for renewal and her filing fee. Although Ms. King was given a receipt for the fee which was paid in cash, her registration was not renewed at that time.

In the Tribunal's opinion, Ms. King's registration expired on June 7th, 1987, consequently her application of June 17th, 1987 must be considered as an application for registration as distinct from an application for renewal of registration.

Although the Registrar's Proposal, dated September 18th, 1987, was drafted in the alternative to cover several contingencies, the Proposal states in part that the "Registrar is proposing...to refuse to register King as a real estate salesperson under the Act". The Registrar cites the past conduct of Ms. King and her failure to disclose a record of convictions in her several applications for registration as grounds for his Proposal.

Ms. King was not represented by counsel. She was given the opportunity to cross-examine Ms. Talbot, who was the first witness. However, on being told by the Chairman to ask questions rather than argue with the witness, Ms. King withdrew from the hearing. The Tribunal continued with the hearing in her absence.

Exhibits 5 and 6, filed by counsel for the Registrar, are copies of Ms. King's applications for registration and renewal of registration dated May 12th, 1983 and May 14th, 1985 respectively. Exhibit 11 is a copy of the Application for Renewal which Ms. King brought with her on June 17th, 1987. On all three applications, Ms. King replied in the negative to Question 7 which reads in part, "Have you ever been convicted under any law of any country or state or province..."

Paragraph 10 of the Notice of Proposal (Exhibit 3) lists a series of convictions registered against Ms. King, primarily for theft and possession of stolen property. The first conviction was recorded on June 27th, 1977, the last on April 21st, 1986. According to Ms. Talbot, Ms. King admitted this record during a meeting with the Registrar at which Ms. Talbot was also present.

In addition to Ms. Talbot, Police Constable Lloyd Penney also gave evidence as to the circumstances surrounding the most recent conviction for theft registered against Ms. King. Exhibit 12 shows Ms. King was arrested some time in May 1987. Exhibit 13, dated December 21st, 1987 shows that Ms. King was convicted under the Criminal Code of theft under \$1,000 and was given a suspended sentence, placed on probation for one year, required to perform 75 hours of community service, required not to change her place of residence without notifying her probation officer, and required to attend for treatment of an alcohol problem.

Ms. King generally admitted her past record. She said that she had lied on her applications because she

believed that if she told the truth, she would not be registered. Ms. King was clearly agitated during her short attendance at the hearing. She believed she was still registered as a real estate salesperson. She stated that if her registration was revoked, she would be deprived of her livelihood.

At the beginning of these Reasons for Decision, the Tribunal concluded that Ms. King's registration expired on June 7th, 1987 because she failed to apply for renewal within the prescribed time. Therefore, the issue for the Tribunal to decide is whether her application for registration should be granted.

The Tribunal has reviewed the nature and number of offences with which Ms. King has been charged. The offences have taken place periodically and repeatedly over a period of a decade - the last conviction being registered on December 21st, 1987. Several of the offences appear to have been committed while Ms. King was on probation. Ms. King is presently on probation until December, 1988. She has been ordered by the Court to take treatment for alcoholism. Ms. King's behaviour and outburst during the hearing is of concern to the Tribunal because it appears that Ms. King is unable to control herself under stress. From Officer Penney's evidence, this lack of control seems to have led to her latest conviction.

This past conduct, coupled with her deliberate deceit of the Registrar about her previous criminal record leads the Tribunal to conclude that the Registrar has reasonable grounds for belief that Ms. King will not carry on business in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out her Proposal.

FRANK C. MacDONALD

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
TIBOR PHILIP GREGOR, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

KEITH R. MILLIKEN, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 4 February 1988

Toronto

REASONS FOR DECISION AND ORDER

According to the Director's Certificate filed, Frank C. MacDonald was registered as a real estate salesman from July 1982 to August 20th, 1985 at which time his broker terminated his employment. Consequently Mr. MacDonald's registration as a salesman also terminated on that date. On February 17th, 1987, Mr. MacDonald applied to reinstate his previous registration. In his Notice of Proposal, the Registrar cited the past conduct of the Applicant as affording reasonable grounds for belief that Mr. MacDonald will not carry on business in accordance with law and with integrity and honesty.

In his application Mr. MacDonald revealed that he had been recently (December 1986 and January 1987) convicted of possession of a narcotic (hashish), of acquisition of a fire arm without a fire arm acquisition certificate, and of possession of a fire arm dangerous to the public. He stated that he had been fined and placed on probation for a period of one year. When further investigation was undertaken by the Registrar, it was learned that Mr. MacDonald had also been convicted of attempted theft in 1972 and given a suspended sentence.

Mr. Coleclough, the former Registrar said he gave little weight to the 1972 conviction in concluding that Mr. MacDonald was not entitled to registration. His main concern

was Mr. MacDonald's recent brushes with the law. Paragraph of the Particulars, as set out in the Notice of Proposal which contained allegations which went to the issue of honesty and integrity was withdrawn at the commencement of the hearing.

Sergeant John McNiven of the Hamilton-Wentworth Police Department testified that as a result of information received, he along with another officer attended at Mr. MacDonald's residence with a search warrant seeking a fire arm. Mr. MacDonald led the officers to a second floor kitchen where a 12 gauge shot gun was recovered. Sergeant McNiven had learned that Mr. MacDonald had become involved in business arrangements with some 'dangerous people' and understood that Mr. MacDonald feared for his own safety.

There were no details given of the business arrangements nor was the identity of the 'dangerous people' revealed. The Sergeant also stated that a small amount of hashish had been found on Mr. MacDonald's person after he had been arrested and this resulted in the narcotics conviction. Mr. MacDonald has kept in touch with Sergeant McNiven since the conviction. The probation period imposed on Mr. MacDonald has now expired.

Mr. MacDonald was not called upon to testify. The Tribunal draws no adverse inference from this decision. The only witness called on behalf of the Applicant was John Munro who was shown on one document on file as Mr. MacDonald's solicitor. Mr. Munro was very candid about his bias in favour of Mr. MacDonald. It was his opinion that Mr. MacDonald has honesty and integrity. Mr. Munro said he was aware of the circumstances surrounding Mr. MacDonald's arrest but he gave no details. Mr. Munro merely stated that he personally would not have been concerned in the particular circumstances, however, he believed that Mr. MacDonald had been frightened.

Mr. Milliken, counsel for the Applicant, drew the Tribunal's notice to a decision released in January, 1987 - Biro. In that case, Mr. Biro had been convicted of having a machine gun in his possession without a registration certificate. At the time Mr. Biro applied for registration as a real estate salesman, he was still on parole.

According to the decision, it was the Registrar's recommendation at the hearing before the Tribunal that Mr. Biro be registered subject to certain terms and conditions.

The Tribunal accepted the recommendation but increased the frequency of reporting. Counsel for the Registrar cited the Jacobs case and the Brenner decision in support of her submissions that the Tribunal ought to uphold the Registrar's Proposal.

Aside from the fact that Mr. MacDonald's probation has been completed, the Tribunal is hard pressed to distinguish the Biro case.

Mr. MacDonald frankly and fully disclosed his latest convictions in his application. In that, he showed a degree of honesty and integrity. We do not have the details of his problems which led to his obtaining a fire arm. However, the shot gun was found in his home. There was no evidence that it had been used against any person in any way. Mr. MacDonald is subject to a Prohibition Order which prohibits him from possessing any fire arms for a period of five years. The Tribunal agrees with the former Registrar that the 1972 conviction should be a factor in its consideration. However, the offence took place when Mr. MacDonald was about 17 years old and until 1986, he has had a clean record. We, therefore, do not give much weight to that conviction. On balance, we do not believe that Mr. MacDonald poses a threat to the public.

Under the Act, Mr. MacDonald is entitled to registration unless his past conduct disentitles him. On the evidence before us, we believe that Mr. MacDonald's past conduct cannot support the conclusion that in future, he will not carry on business in accordance with law and with honesty and integrity. However, we are of the opinion that although he is entitled to registration as a real estate salesman, terms and conditions should be imposed. The terms and conditions imposed in the Biro case seem appropriate in the circumstances.

Accordingly by virtue of the authority vested in it by Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to allow the registration of the Applicant as a real estate salesman effective March 1st, 1988 on the following conditions:

1. That Eric Charles Ltd., the Applicant's intended employer, provide the Registrar with an agreement in writing whereby Eric Charles Ltd. agrees to report in writing to the Registrar every three

months for a period of two years from March 1st, 1988, as to the Applicant's performance as a real estate salesman and in particular with respect to his compliance with the law.

2. In the event that the Applicant transfers to another broker, that that broker be notified of and provided with a copy of the Decision of the Tribunal, and that that broker provide the Registrar with an agreement in writing whereby that broker agrees to report in writing to the Registrar every three months for a period of two years from March 1st, 1988, as to the Applicant's performance as a real estate salesman and in particular with respect to his compliance with the law.

METRO (HAMILTON) REALTY INC.
NICHOLAS LAPCEVICH

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
JOHN W. PATERSON, Member

APPEARANCES:

ROGER D. YACHETTI, representing the Applicants

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers.

DATE OF

HEARING: 26 November 1987

Hamilton

REASONS FOR DECISION AND ORDER

In this matter, the Registrar proposed the revocation of the broker's licence of Metro (Hamilton) Realty Inc. and of Nicholas Lapcevich who operates the company on the grounds that the conduct of Lapcevich in three real estate transactions indicates that the business will not be carried on in accordance with the law and with integrity and honesty as provided for in Section 6(c)(ii) of the Real Estate and Business Brokers Act.

In his initial presentation, the Registrar dealt with the involvement of Lapcevich in three real estate transactions which took place in the Hamilton area but in his final submission to the Tribunal, he withdrew the claims arising out of two of them, leaving only one to be considered. The Tribunal will, therefore, deal only with the evidence as it pertains to the conduct of the registrant in the sale of the Texas Country Restaurant owned by 601069 Ontario Inc.

One would think that the purchase of a country restaurant would be a relatively simple transaction but there are so many offers and overtures made for this business that a certain amount of confusion is unavoidable.

The Texas Country Restaurant in Waterdown was apparently the subject of a purchase on August 19th, 1985, by someone with an indiscernible signature later identified by the registrant's counsel as one Mervin Hatt (Exhibit 3, Tab 1). It is unimportant except to note that the vendor was 601069 Ontario Inc., a Company which appears throughout subsequent transactions, and there is no evidence to indicate the result of this one.

The business, however, had been listed for sale with Marel Real Estate and one Victor Zabroski, represented to be the only shareholder of 601069 Ontario Inc., executed an irrevocable Direction to his solicitor to pay the real estate broker the sum of \$7,000 commission on the sale (Exhibit 3, Tab 2). No further evidence was offered concerning this transaction.

We next find the restaurant being listed for sale again with Marel Real Estate broker and Nicholas Lapceovich as agent on November 7th, 1985, for the sum of \$98,000 with the listing expiring on February 28th, 1986 (Exhibit 3, Tab 3). Lapceovich was an agent employed by Marel Real Estate until he transferred his registration to Com-Can Merchantile Realty Inc. in January of 1986. The vendor in this listing was still 601069 Ontario Inc.

Shortly thereafter on November 28th, 1985, Victor Zabroski purports to sell the restaurant to one Farshad Tchmartchi for \$123,000 and 601069 Ontario Inc. joins in as third party. This Offer provides for the sale of all the shares of 601069 Ontario Inc., which appears to own the restaurant and Zabroski holds himself out as owning all the capital stock. The Offer, however, is not executed by either party or the Company and no further arrangements were made to conclude this offer (Exhibit 3, Tab 4).

On the same date, November 28th, 1985, Zabroski again proposed to sell the restaurant and the Company shares to one Kenneth Brownell for the sum of \$31,000 with the purchaser assuming a chattel mortgage in the amount of \$41,000 (Exhibit 3, Tab 5). The Offer is signed by both parties with 601069 Ontario Inc. again joining in as a third party. The transaction appears on the Trade Record sheet of Marel Real Estate Inc. dated December 16th, 1985 (Exhibit 3, Tab 6), but like the previous ones, does not seem to have been completed since the closing date was scheduled to be 10 days after the transfer of the liquor Licence, which was never transferred. Clause 19 of the Offer provided that the purchaser pay any

commission due on the sale to Marel and Lapceovich. We can draw no inference from that except that Brownell must have made a private agreement with Lapceovich and the broker concerning the commission.

In January of 1986, Lapceovich transferred his licence to another company and some time later, the date is uncertain, he met Hannelore White and Marita Neuhaus who had been discussing the purchase of a restaurant with one Ronald Detnor, assumed to be another real estate agent. Nothing came of their negotiations with Detnor - presumably because they had no money - and they then entered into discussions with Lapceovich with the same purpose in mind. Who initiated the conversations is unimportant and the evidence on that point is conflicting. In their testimony, they both said that Lapceovich told them he knew of a restaurant for sale and could find financing for them. This, of course, simply heightened their resolve to purchase a restaurant and resulted in their introduction to one Tchmartchi through Lapceovich.

Prior to meeting Lapceovich, however, the two ladies had been dealing with one Robert Steiner. Marita Neuhaus, in her evidence, indicated that Steiner brought Lapceovich to see her some two months after her dealings with Detnor and if that is true, then they were considering the purchase of the subject restaurant even before they met Lapceovich. Exhibit 3, Tab 9 is another Offer to Purchase in which Steiner appears as vendor and sole owner of all the capital stock of 601069 Ontario Inc. and provides for the sale of all the shares in the Company to Neuhaus and White for the sum of \$123,000. This Offer is dated February 14th, 1986. Steiner on this date holds himself out to be the sole owner of the shares in 601069 Ontario Inc. This Offer is signed by both Neuhaus and White, but not accepted by Steiner or by anyone representing the Company. It would appear from their evidence that this Offer was signed in the office of Mr. Mourtiopoulos, but the evidence is somewhat muddled on that point. This sale, like the previous ones, was never completed.

Exhibit 7(a) is the final Offer on this business with which we are concerned. Under that Offer, Zabroski, now purporting to be the sole shareholder of 601069 Ontario Inc. enters into an Agreement of Sale of all of the shares in the Company to Hannelore White and Marita Neuhaus. The Offer calls for the payment of \$32,000 by cash or certified cheque on closing, the assumption of a chattel mortgage in the amount of \$41,000 in favour of Natasha Motors Ltd. repayable at the rate of \$750.00 monthly for three years, and an additional payment of \$1,800 covering deposits for hydro and gas. The transaction is scheduled to close on April 4th, 1986.

It was at this point that Lapceovich and Tchmartchi entered into serious discussions with the potential purchasers concerning the financing of the restaurant since, it must be remembered, they had no money. Several meetings apparently had taken place; Tchmartchi obtained a credit report on them which, according to his evidence, was unsatisfactory and he no longer was interested in the transaction. Tchmartchi in further evidence, however, indicated that the two ladies continued to harass him about the financing of the business and he went to Lapceovich requesting that he "get them off his back". The result was that Tchmartchi went to his bank, borrowed \$40,000, insisted that Lapceovich join in the note and the funds then became available to the purchasers for the down payment. The \$40,000 was then ostensibly secured by a chattel mortgage from White and Neuhaus in favour of Tchmartchi and Lapceovich in the amount of \$85,000 which constituted a \$45,000 bonus to them. This mortgage called for the payment of \$750.00 monthly and matured in two years. The mortgage secured the chattels subject to the prior mortgage in favour of Natasha Motors Ltd. but no one seems to have noticed that the purchasers did not own the chattels since they were the property of 601069 Ontario Inc. The mortgage was, therefore, no better security than a Promissory Note.

From the evidence of White and Neuhaus, one would be inclined to conclude that they had no idea what was going on in this transaction. They had been referred to Mr. Tchmartchi's lawyer, a Mr. Mourtiopoulos, to have him act for them in the transaction, but on the other hand, they had attended at the office of a bank manager, discussed the matter with him and his advice to them was to seek another lawyer. They did not do this but one must assume that the bank manager was not satisfied with the transaction and told them so. Whatever advice they received, however, made no difference since they took possession of the restaurant on April 4th, 1986, and within a period of a few months, abandoned the business.

The dealings throughout this whole affair are bewildering and unsettling. There is a thread which runs through the transaction, although ostensibly innocuous, which resembles the coil of a serpent. We have the restaurant and around it the mysterious, shadowy figures of men who never appeared to give evidence - Hatt, Zabroski, Steiner, Brownell. We are left to speculate, draw inferences and wonder at the motives of each.

But in all the confusing and murky transactions surrounding the disposition of the shares of Texas Country

Restaurant and 601069 Ontario Inc., one fact is blatantly clear and that is that the ultimate purchasers, Neuhaus and White, were no more than mere children in the hands of highly experienced dealers and speculators in real estate. Despite the documentary evidence to the contrary, they did not even appear to know what they were buying except that it was a restaurant.

Part of the blame for this must be attributed to the conduct of both Mr. Lapceovich and Mr. Mouropoulos compounded by what appears to be the limited knowledge of the English language and the careless desire and blind insistence on purchasing a restaurant of Neuhaus and White.

The issue has been raised by the Registrar that Lapceovich should have disclosed his interest in the restaurant as the listing agent. That may well be, but it is of no consequence since the purchasers were fully aware that he was a real estate agent and under the Offer to Purchase, no commission was payable to him. That, however, raised a further issue which is really the crux of the matter. Was Lapceovich acting in the capacity of a real estate agent intent upon selling the property for his vendor, or was he engaged solely in obtaining financing for the transaction?

Let us look at the final Offer to Purchase which curiously is dated May 1st, 1986, but provides for the transaction to close on April 4th, 1986. That is simply one more confusing element in a most muddled affair, but we can make no comment on it since it appears to have been drawn by Mr. Mouropoulos and neither he nor Mr. Zabroski was present to give evidence. The purchasers do not appear to have understood its contents or, if they did, were not aware of the liabilities they were assuming.

But we digress. What did Lapceovich stand to gain under this Offer? There is no reference of a commission payable to him or to his broker and it obviously was signed after the Marel listing had expired on February 28th, 1986. Further, we cannot find on the evidence that any commission was paid. Thus, the evidence leads us to the inescapable conclusion that Lapceovich was not interested in the sale as agent for Zabroski from which he would gain perhaps nothing, but in financing the proposition from which he stood to profit in the sum of \$22,500 at the end of two years. He should, however, have known, having regard to the past performance of the restaurant, the obligations assumed by the purchasers and their very limited business experience, that this was simply a

dream. The business obviously could not succeed and one of the purchasers subsequently made an assignment in bankruptcy. Both Lapcevich and Tchmartchi were left with a \$40,000 liability to the bank, a worthless chattel mortgage and a deserted restaurant.

The question of the honesty and integrity of Lapcevich throughout this whole unhappy affair must now be considered. The Tribunal finds as a fact that there is no evidence to support the allegation of lack of honesty on the part of Lapcevich. His integrity, however, is both suspect and questionable, and we consider integrity to be a reflection of past conduct. It is questionable in his dealings with two naive purchasers and is only tempered by their apparent all-consuming desire to have the restaurant regardless of the cost. It is suspect in his participation in the financing of the business from which it must have appeared to him at the time, he stood to gain considerably, but that is tempered by the fact that Tchmartchi insisted he assume the joint liability at the bank and, if he were to do that, it naturally followed he would accept the benefit accruing from the chattel mortgage.

Is there, however, sufficient evidence of lack of integrity for this Tribunal to accede to the Registrar's Proposal? The Tribunal's disapproval of the conduct of Lapcevich in this affair is not in our view sufficient to support the Registrar's Proposal and it will, therefore, be denied.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal.

ALEKSANDER MILOVANOVIC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN W. HARVEY, Member

APPEARANCES:

E.A. Du VERNET, representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 27 January 1988

Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Registrar is proposing to revoke the registrant's licence as a real estate salesman. The events giving rise to the Proposal took place between November 1986 and February 1987 and relate to two large land parcels, which, for the purposes of these reasons, can be referred to respectively as the "Kennedy Road" property and the "Winston Churchill" lands. At the relevant time, the registrant was employed by H. Esco Realty Limited and had had approximately one year's "commercial" real estate experience, with some prior residential experience.

The registrant first learned of the Kennedy Road tract of land from Mr. Max Trachter. Mr. Trachter described himself at this hearing as being in the mortgage and land business. While there is conflicting evidence as to exactly what Mr. Trachter said to the registrant regarding his relationship to the Kennedy Road property, the Tribunal accepts that the registrant believed that Mr. Trachter exercised some manner of control over the property. Certainly it is clear from the evidence that Mr. Trachter was actively seeking offers for the property and it was for that reason that he told the registrant about it. Mr. Trachter provided the registrant with a plan of the Kennedy Road property and surrounding lands headed "Kennedy Road Development Concept Plan". This plan had an instrument number and the name "Gomilia Properties Ltd." printed on the

subject parcel. This would at least raise the question of ownership to a professional real estate person reviewing the plan.

Mr. Trachter told the registrant that all offers should be directed to "David Rubenstein in trust" as vendor explaining that Mr. Rubenstein was the solicitor who would deal with the matter as trustee for the owners. The registrant seems to have accepted this explanation. The registrant at no time had a formal listing for the property nor did he at any time represent to any other party that he had a listing. The registrant took the plan from Mr. Trachter and exposed it by placing it on the wall on his office where it was seen by Alojz Srsa, a real estate salesman employed by Dresher Real Estate. Mr. Srsa had a client who he thought would be interested in the property. He took a copy of the plan and the two agents drafted an offer which Mr. Srsa then forwarded to his client in Thunder Bay. Mr. Srsa also saw the name "Gomilia Properties Limited" on the plan but did not object or express concern when the registrant advised him that the offer was to be addressed to "David Rubenstein in trust" as purchaser.

Subsequently, the offer was revised to make the agreement conditional upon the purchaser arranging suitable financing within a 20 day period. The signed offer was returned to Srsa with a purported deposit cheque in the sum of \$75,000. Notably the cheque was not a proper deposit cheque since it was made payable to Alojz Srsa. Srsa delivered the offer and cheque to the registrant. The registrant then obtained a letter from David Rubenstein addressed to Mr. Srsa's purchaser, confirming that should the Agreement of Purchase and Sale become final and binding, his client, Max Trachter, would provide the requisite financing. Mr. Srsa testified that he asked his client to provide a proper replacement deposit cheque, however, this was never provided. The registrant testified that he asked Mr. Srsa for a proper deposit cheque to present with the offer but never received it. In any event, as the Tribunal learned from Mr. Trachter, the offer from Srsa's purchaser could not have been accepted in any case since it transpired that Mr. Trachter had never obtained control of the property but was merely attempting to purchase it himself and flip it for a profit. Mr. Trachter was apparently overconfident about his chances of purchasing the property when he approached the registrant initially. In the result, there was never any accepted Agreement of Purchase and Sale between Mr. Srsa's purchaser and David Rubenstein in trust (for Max Trachter) as vendor.

With respect to the events relating to the Kennedy Road property, the registrant failed to exercise a reasonable degree of diligence and professionalism in his dealings. He should have taken reasonable steps to ascertain the true ownership of the property and to satisfy himself that Mr. Trachter had authority to deal with the property before soliciting offers for the property from other parties. Such investigation, should, in the Tribunal's view, have occurred as a matter of course, and particularly in circumstances such as these, where the plan given to the registrant by Trachter suggested that the parcel was owned by some other entity. While the Tribunal is dissatisfied with the lack of professionalism demonstrated by the registrant, it must be taken into account in reviewing this matter, that the registrant did not, at the relevant time, have a great deal of experience in commercial real estate and may have been "duped" to some extent by Mr. Trachter. The Tribunal does not find on the evidence that the registrant's actions with respect to the Kennedy Road property, while lacking in proper professionalism and diligence, afford reasonable grounds for belief that he will not carry on business in accordance with law and with honesty and integrity.

With respect to the Winston Churchill tract of land, once again the registrant was approached by Mr. Trachter, who again gave him a large plan showing the property, told him he was looking for offers on the property and generally gave the registrant the impression that he controlled the property. Again Mr. Srsa saw the maps and, in due course, submitted two offers from Trail-Run Construction Limited in trust (there were two adjacent parcels involved) to the registrant, again naming David Rubenstein in trust as the vendor. The registrant said that he did not present these offers for two reasons. Firstly, the offers were "idiot" offers with a 10 year closing period. Secondly, and more importantly, he learned that Mr. Trachter did not own the properties.

Subsequently, the registrant directly contacted Mr. Gaj, the owner of one of the two adjacent "Winston Churchill" parcels. Apparently, the parcel owned by Mr. Gaj was the key piece of land for development in the area. Mr. Gaj did not want to list the property with the registrant but was prepared to entertain and consider offers that the registrant brought him. He indicated to the registrant that he did not want to pay a commission to a real estate agent and that the agent should look to the purchaser for commission. Mr. Gaj provided the registrant with a draft offer, prepared by Mr. Gaj's solicitor, setting forth the price, and terms and conditions of sale that he (Gaj) wanted for the property.

The registrant asked Gaj whether he would get his commission paid by Gaj if he brought him an offer for the price he was asking for. Mr. Gaj refused to agree to payment of the commission. At about this time, the registrant presented and asked Gaj to sign the following "Agreement and Acknowledgement":

AGREEMENT AND ACKNOWLEDGEMENT

BETWEEN :

"ESCO REALTY LTD
TORONTO
ONTARIO

AND

MRS. HELENA & MR. MAXYMILIAN GAJ
7169, 10th LINE
MISSISSAUGA

MRS. HELENA & MR. MAXYMILIAN GAJ HEREBY CONVENANTS AND AGREES TO PAY UNTO "ESCO REALTY LTD." AN AMOUNT OF MONIES AS A COMMISSION, BEING THE DIFFERENCE BETWEEN THE "ASKING PRICE" OF TWO MILLION FOUR HUNDRED THOUSAND DOLLARDS (CAN. \$2,400,000.--) AND THE ACTUAL SALES PRICE, FOR AN OFFER OR SALE OF ITS PROPERTY AND ASSETS KNOWN AS 7169, 10th LINE (CON. 11, PART LOT 12.) MISSISSAUGA, UNDER THE CONDITIONS SET OUT IN THE ATTACHED AGREEMENT OF PURCHASE AND SALE, ON THE DATE SET FOR COMPLETION.

DATED IN MISSISSAUGA, THIS DATE OF JANUARY, 1987.

WITNESS :

VENDOR

MRS. HELENA GAJ

MR. MAXYMILIAN GAJ

Mr. Gaj refused to sign this document.

Section 34(1) of the Real Estate and Business Brokers Act provides:

No broker or salesman shall request or enter into an arrangement for the payment to him of commission or other remuneration based on the difference between the price at which real estate is listed for sale and the actual sale price

thereof, nor is a broker or salesman entitled to retain any commission or other remuneration computed upon any such basis.

The registrant testified that the wording for the document was provided to him by Mr. Srša and that, at the relevant time he, the registrant, was not aware of Section 34(1) of the Act. He testified that had he been aware of Section 34(1), he would not have attempted to have Mr. Gaj agree to such an arrangement.

Subsequently, Mr. Srša's purchaser, Trail-Run wanted to submit a new offer. The registrant requested and had a meeting with Srša and the principal of Trail-Run, Mr. Niremborg, who was himself a real estate broker. At that meeting, the registrant asked Mr. Niremborg, or rather Trail-Run Construction Inc., to pay him a commission of \$100,000 on closing if the offer was accepted. Mr. Niremborg was not receptive to this suggestion to say the least. The registrant did not present the Trail-Run offer to Mr. Gaj as a result. However, Mr. Srša did later contact Gaj directly and presented to him an offer from Trail-Run which Gaj declined. The property was eventually sold to another purchaser through the registrant with Mr. Gaj agreeing to pay the registrant a \$70,000 commission.

With respect to the Winston Churchill property, while it was not improper for the registrant to ask the prospective purchaser to agree to pay the real estate commission, particularly in this instance where the vendor had indicated he did not wish to pay the commission and had more or less suggested to the registrant that he look to the purchaser for any commission, the Tribunal concurs with the submission of counsel for the Registrar that the registrant ought to have set out the proposed commission agreement in the body of the Agreement of Purchase and Sale so that it would be clearly disclosed to the vendor prior to the acceptance of any offer.

Of even greater concern to the Tribunal is the registrant's clear breach of Section 34(1) of the Act when he attempted to have Mr. and Mrs. Gaj sign the "Agreement and Acknowledgement" described earlier in these reasons. The registrant said he was not aware of Section 34 at the time. Such lack of knowledge by a real estate salesman of the very Act that governs his profession is inexcusable. The registrant's attitude towards his lack of familiarity with the provisions of the Act was, in the Tribunal's view, a rather

cavalier one which causes this Tribunal to be gravely concerned about his overall ability to practice his profession in a manner that is in accordance with law and in accordance with his duty to the public, which looks to him for guidance and assistance in these very matters.

Notwithstanding these serious concerns, the Tribunal does not consider it appropriate in the circumstances of this case to revoke or immediately suspend the registrant's licence. The Tribunal does consider it necessary for the registrant to improve his knowledge and understanding of his duties and obligations as a real estate salesman, and, in particular, his knowledge of the provisions of the Act.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar not to carry out her Proposal and directs the Registrar to attach the following terms and conditions to the registration:

1. Mr. Milovanovic shall, within the next 90 days enroll in and attend the "Introduction to Real Estate" courses of study approved by the Registrar and required to be taken by all persons prior to registration as a real estate salesperson.
2. The Registrar shall be satisfied that Mr. Milovanovic has successfully completed the required written examinations approved by the Registrar within the next six months.
3. In the event that Mr. Milovanovic fails to complete the said examinations successfully, his registration shall be suspended forthwith and the suspension shall continue until such time as the Registrar is satisfied that Mr. Milovanovic has successfully passed the required examinations.

STUART A. MONTGOMERY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
ROLAND C. BRENNING, Member

APPEARANCES:

D. MITCHELL, representing the Applicant

JOHN W. BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 14 July 1988

Ottawa

REASONS FOR DECISION AND ORDER

This is a very sad case in which the Applicant now appears earnestly desirous of reforming from a criminal career which began at age 16 with two convictions for possession of narcotics; progressed, or perhaps declined would be a more appropriate description, into a conviction for conspiracy to traffic in narcotics when he was 22 and another conviction of possession of narcotics for the purpose of trafficking when he was 23, which latter charge produced a five year jail sentence. In 1982 when he was 27, two theft convictions were registered, although the Applicant provided the Tribunal with extenuating circumstances in these cases. In 1986 at the age of 31, he was convicted of theft of hub caps which even his counsel characterized as a juvenile act. In 1987, on his own evidence, the Applicant was convicted of assault and in 1988, arising out of a charge in 1987, he was convicted of possession of narcotics for the purpose of trafficking and is now serving an 89 day intermittent sentence, which by serving on week-ends will expire at the end of September 1988. This latest conviction arose out of the sale of two grams of hashish to a prostitute in 1987, in respect to which the Applicant frankly admitted to the Tribunal, he was fully aware of what he was doing.

He also acknowledged that he had himself been a drug user, but that since about a year ago, he has not been using drugs. From age 16 to age 32, he was deeply involved in the

drug sub-culture and by his own evidence subjected to criminal pressure from which he hopes he would be able to escape by becoming licensed as a real estate salesman, marrying the mother of his three year old child and establishing a mature family relationship free from the influence and pressures of his criminal past. The Tribunal was impressed with Mr. Montgomery's present sincerity and hopes that he will successfully overcome his past sixteen years of crime, but notes that this resolution for reform has only existed for less than one year and that he is still serving a sentence which will not be completed until later this year.

The Tribunal moreover is bound by its duty to the public in Ontario and, in particular, to the specific direction of the Legislature of the Province of Ontario as expressed in subsection 6(1) of the Real Estate and Business Brokers Act which reads as follows:

6(1) An applicant is entitled to registration...by the Registrar except where...

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

(emphasis added)

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

Counsel for the Registrar referred the Tribunal to two Richard G. Brenner cases and the Divisional Court decision in respect thereto. The facts are strikingly similar. In the first Brenner case, heard in 1982, it appears that for 20 years from age 16, Brenner had a series of convictions involving theft, assault and drugs. Evidence at the hearing indicated that Brenner had reformed although such reformation had only existed for several years before the hearing. The Tribunal indicated that it was prepared to encourage Brenner to upgrade himself and granted conditional registration. While this case was decided under the Motor Vehicle Dealers Act, the section

being considered was identical to that in the Real Estate and Business Brokers Act.

On appeal to the Divisional Court in 1983, the Divisional Court indicated that the test used by the Tribunal in the first Brenner case was wrong. The Court stated that the test for the Tribunal was to determine whether the Registrar was in error in concluding that the past conduct of Brenner afforded reasonable grounds for belief that Brenner would not carry on business in accordance with law and with integrity and honesty, not whether Brenner had genuinely reformed.

Because the Registrar had not asked for a stay of the Tribunal's decision, the Court directed the Tribunal in the second Brenner case to consider the conduct of Brenner, however, in the year subsequent to the first decision. On the basis of evidence given at the second hearing, including the previous criminal record, the Tribunal decided nevertheless, that Brenner should not be permitted to be registered as a salesman.

This Tribunal cannot under the circumstances find that the Registrar erred in concluding that the Applicant's past conduct disentitled him to registration. Even the evidence presented to this Tribunal was not sufficient to show that Mr. Montgomery is prepared to carry on business in accordance with law and with integrity and honesty. Mr. Montgomery needs more time to produce an historical record to overcome his past conduct.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

NIKOLA ORLIC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN W. PATERSON, Member

APPEARANCES:

NIKOLA ORLIC, appearing on his own behalf

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 13 October 1987

Toronto

REASONS FOR DECISION AND ORDER

In his application dated November 3rd, 1986, the Applicant, Nikola Orlic, has applied for registration as a salesman pursuant to the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431. The Registrar, however, proposes to refuse him registration under Section 8(1) of the Act which reads in part:

Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

In his reasons for refusal, the Registrar sets out the two grounds provided for in section 6(1)(a) and 6(1)(b) and both must be addressed by this Tribunal.

Mr. Orlic, a man of 55 years, came to Canada in 1957 and is presently residing with his wife in Stoney Creek. He had previously registered as a real estate salesman on May 12th, 1981, employed by State Realty Limited, Stoney Creek, Panacea Realty Ltd., Hamilton, returning to State Realty on May 15th, 1983 until November 12th of that year. He does not seem to have been associated with the real estate industry since that time and in fact, his application reflects no employment of any sort in the past four years. There is, however, nothing

in this record of employment that would disentitle him to registration since there appear to be no complaints filed against the conduct of his business dealings.

The Registrar, however, has raised a most pertinent issue under Section 6(1)(a) alleging that:

...having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The question is raised understandably because Mr. Orlic had shown no employment or income for the years 1984 to 1987 on his application. The Tribunal, however, has had the benefit of Mr. Orlic's evidence on that point. Prior to entering the real estate field, he worked at Dofasco in a very ordinary employment at which he could not expect to become well off. He then went into real estate and leaving that started his own company, Parkta Consulting Inc., with the head office at his residence in Stoney Creek. He said his wife is the company's secretary and his gross income in 1986 was \$16,932.48. Although his evidence was most unsatisfactory on what the company was set up to do and his role in it, he appears to be advising individuals on real estate matters without actually trading in real estate. He referred to a payment he was to receive in the amount of \$100,000.00 but that payment also appears to be subject to litigation.

We find Mr. Orlic's evidence on his financial position inconclusive and we consider the onus is on him to satisfy the Tribunal that the objection of the Registrar is without foundation. He has not done this. If, however, that had been the only issue raised by the Registrar, the Tribunal would have considered an adjournment of these proceedings to give Mr. Orlic an opportunity to bring further evidence before it.

There is, however, a second objection raised by the Registrar under section 6(1)(b):

...the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

What are the facts? Along with his application, the Applicant filed with the Registrar two police reports, one by

the Hamilton-Wentworth police and the other by the Ontario Provincial Police. The record of criminal convictions is substantial and includes possession of an offensive weapon, assault, break and enter, failing to remain at the scene of an accident, theft under, assault with a weapon, possession of an unregistered restricted weapon and use of a firearm. The last conviction was in Hamilton on June 26th, 1986, and Mr. Orlic received the following sentences:

18 months incarceration on first count;

6 months incarceration concurrent on
the second count;

1 year incarceration consecutive to any
other sentence imposed.

He is further prohibited from having in his possession any firearm, ammunition or explosive substance for a period of five years after his release. He is at the time of this hearing on probation which will expire in December of 1987. These convictions are of a most serious nature and we are even more troubled with the charge of fraud and possession of stolen property pending in Halton County which was to have been heard on July 27th, 1987 but, according to Mr. Orlic, has been adjourned until January 1988.

The Registrar has produced as Exhibit 8, a record of Mr. Orlic's driving offences which was not disclosed on his application. Only one of these 11 offences, that of failing to remain at the scene of an accident, was under the Criminal Code and the rest are convictions and suspensions under the Highway Traffic Act. Nevertheless, they indicate a certain disregard for the law.

Mr. Orlic, in giving his evidence, impressed us as an energetic but high-strung, volatile man who appeared to be determined and able to settle accounts with his fellow man by his own resources without resorting to assistance from the authorities and his background reflects this attitude.

Having regard to all the evidence before us, the Tribunal has no choice but to agree with the proposal of the Registrar to deny the application of Mr. Orlic. We consider it inappropriate to register the Applicant at this time but if and when his circumstances change, there is nothing to stop him from reapplying. We are supported in this decision by a recent judgement of the Tribunal in the appeal of Orval David Bradt which was heard on July 17th, 1987.

In that case, Bradt, applying for registration, had failed to disclose a record of driving offences as had Mr. Orlic. He also had a criminal record arising from convictions under both the Narcotics Control Act and the Criminal Code but had not produced his full record with his application. On the other hand, there was no evidence that he had ever contravened any of the provisions of the Real Estate and Business Brokers Act. Nevertheless, the Tribunal held and we quote:

The cumulative effect of Mr. Bradt's brushes with the law, the nature of the offences and the fact that his parole only ended in January 1987 leads this Tribunal to the conclusion that the Registrar has not erred in his belief and that Mr. Bradt should not be registered at this time. It is the opinion of this Tribunal that the public would not be well served if the Registrar's Proposal was overturned.

We are of the same view with regard to the application of Mr. Orlic.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MORENO TRAVEL MARKETING LTD.
operating as
GOOD TIME HOLIDAYS and
CELSIUS TRAVEL WEST INC.

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIM OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STUART E. ROSENBERG, Member
MARGARET DONALD, Member

APPEARANCES:

DOUGLAS C. CROZIER, representing the Applicant

MICHAEL D. LIPTON, representing the
Board of Trustees

DATE OF
HEARING: 18 August 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Moreno Travel Marketing Ltd. ("Moreno" is a registered travel wholesaler, and has requested this hearing to review the decision of the Board of Trustees dated March 17th, 1988, denying its claim pursuant to Section 15(2) of the Schedule to Regulation 938 under the Travel Industry Act, R.S.O. 1980.

The claim arises as a result of the Applicant's dealings with an unrelated company, Celsius Travel (West) Inc. ("Celsius"), which was a licensed travel agent from June 19th, 1979 until August 6th, 1987 at which time, it voluntarily surrendered its license. The Applicant carries on business at 866 The Queensway, Suite 200, Toronto. Celsius, while it was in business, operated from premises located at 886 The Queensway, Toronto.

Moreno had the authority and ability to issue airline tickets on behalf of a number of airlines, including Air Canada and Eastern Airlines, using the plates provided by the airline and its generic ticket stock. Celsius did not have plates for these airlines and was not in a position to issue airline tickets directly to its clients. Commencing in late 1986,

Moreno issued airline tickets for clients of Celsius pursuant to an arrangement agreed upon between Moreno and Celsius. Celsius would deal directly with the airlines to reserve space for its clients, then contact Moreno with the details so that Moreno could issue the tickets. Celsius would then confirm by written purchase order. Moreno would not deal with the airlines at all prior to issuing Celsius' tickets, relying totally on information supplied by Celsius. Celsius was to pay Moreno for the tickets whereupon the tickets would be released by Moreno to Celsius. Moreno had a similiar relationship with other travel agents.

From late 1986 until July of 1987, Moreno and Celsius had dealings in accordance with the arrangement described above with no problems arising. On January 30th, 1987, The Alliance of Canadian Travel Associations Ontario ("ACTA-Ontario"), of which Moreno was a member, issued a "red alert" in respect of Celsius. A "red alert" indicates that only cash or certified cheques should be accepted from the travel agent in respect of whom the "red alert" is issued. Members are first immediately notified of the "red alert" by telephone (utilizing a pyramid system) and this is followed up by a written notification mailed by ACTA-Ontario to the individual members at the beginning of each month in respect of the previous month's alerts.

Witnesses called on behalf of Moreno testified that no telephone call in respect of the January 30th "red alert" was received by Moreno, nor was the follow-up written notification received. They testified that they did not become aware of the "red alert" status of Celsius until August 7th, 1987. A witness representing ACTA-Ontario testified that its records reflect that the telephone call was made to Moreno, and the follow-up letter sent.

Moreno continued to issue airline tickets to Celsius without insisting on payment by cash or certified cheque, with no problems arising until July 1987. In July 1987 Moreno issued, in a series of transactions, airline tickets to Celsius, which tickets were used by Celsius' clients. Moreno did not receive payment from Celsius in respect of a number of these airline tickets. Moreno seeks compensation from the compensation fund established pursuant to Regulation 938 under the Act in respect of some of the airline tickets for which Celsius failed to pay.

In most of the cases that are the subject of the claim for compensation, Moreno released the subject airline tickets

to Celsius upon receiving an uncertified cheque as payment. These cheques did not ultimately clear the Celsius bank account. On July 20th, 1987, Moreno released some airline tickets to Celsius prior to receiving even an uncertified cheque, relying instead on Celsius' promise to provide a cheque later in the day. Payment for the tickets was never received. Replacement cheques were provided to Moreno by Celsius in respect of the cheques which had failed to clear the Celsius bank account, but these too were ultimately rejected as "NSF". Relying upon Celsius' promises to pay, Moreno waited until August 6th, 1987 before attempting to contact the Registrar.

While it may have been possible to cancel some of the tickets issued to Celsius' clients, but not paid for by Celsius before they were used, this was not done. The clients of Celsius were never at risk. They received the travel services that they contracted and paid for. There was no possibility of a claim against the compensation fund by the clients.

As has been stated by this Tribunal in many of its decisions dealing with Section 15 of Regulation 938, the purpose of the compensation fund is to reimburse the client/consumer for travel services paid for but not received. It is not intended to be an insurance fund for the bad debts or business risks of the travel wholesaler.

In its decision in the case of Cosmopolitan Travel Bureau Limited (1986 15 CRAT 235), the Tribunal applied the following interpretation of Section 15(3) of Regulation 938:

In subsection 3, the words "has provided the travel service contracted for but not paid for by the travel agent", in isolation, could be interpreted to mean travel services provided at anytime. However, if these words are so interpreted, and it did not matter if the client ever had a crystallized claim against the fund, the nature of the fund would be substantially altered. It would be, as the Tribunal in other decisions described it, an insurance fund for the bad debts or business risks of the travel wholesaler. Had this been the intention, the purpose of the fund would have been amended to reflect this.

In the Tribunal's opinion, the quoted words, in the context of the whole of the Regulations, the Schedule and in particular Section 15, should be and can be interpreted in the sense that the travel wholesaler has provided the travel service after the client has been put in the position that the contracted travel service is not available to him because the travel agent has failed to pass the client's money to the travel wholesaler. In such a situation, the client has a claim against the fund. By then providing the travel service, the wholesaler steps into the shoes of the client and may claim in his place.

Unless this sequence of events prevails in the first instance, a travel wholesaler has no access to the fund, and it is immaterial whether he extended credit to the travel agent or was a victim of fraud, or whether he acted in good faith and at arm's length.

In the present case, there was never any suggestion that travel services would not be received by Barton's clients. Barton's clients were never in the position of having a claim against the fund. They received the travel services contracted for almost immediately and used them. Therefore, the claim of Cosmopolitan must fail because it did not provide the travel service in accordance with subsection 3 of Section 15 of the Schedule.

The Tribunal can find no reason to apply a different interpretation of Section 15 of Regulation 938 to the facts now before it.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim.

VICTOR BALAEIRO MOTA
and ELIZABETH WILLIAMS
(CALDAS TRAVEL AGENCY)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
KEITH COPPARD, Member

APPEARANCES:

GAIL MIDANIK, representing the
the Registrar under the Travel Industry Act

No one appearing for the Applicants

DATE OF
HEARING: 5 July 1988

Toronto

REASONS FOR DECISION AND ORDER

At the conclusion of the hearing, the presiding member gave brief reasons for the Decision and Order that the Registrar carry out his Proposal. At the same time, he reserved the right to expand the reasons. Following is the Reasons for Decision related to this matter.

The Applicant, Caldas Travel Agency, was registered on February 9th, 1987, as a partnership under the names of Victor Balaeiro and Elizabeth Williams. Balaeiro was listed as the active Manager and Williams as the non-active secretary of the business which was operated at 1109 College Street, Toronto, Ontario.

The Registrar has proposed to suspend or revoke the registration of this agency under Section 5(2) of the Travel Industry Act and pursuant to Section 7 of the Act proposed an immediate suspension considering it to be in the public interest. The Order temporarily suspending the registration expired 15 days from the date of the notice requiring a hearing and the matter was brought before the Commercial Registration Appeal Tribunal on June 29th, 1988 at which time, the Tribunal adjourned the hearing to July 5th and extended the interim suspension until the conclusion of the hearing. The matter now comes before this Tribunal to be considered on its own merits.

It appears that in a spot inspection, Robert Stanley Smith, who does compliance inspections for the travel industry and is employed by the chartered accountant firm Bernard Taub and Company attended at the Caldas Travel Agency on August 12th, 1987. The office was maintained on that date by a Miss Zabal Mantes who spoke little English and who said she did not know of either a Mr. Balaeiro or a Ms. Williams, but that a Mr. Mota would be in later that day. Mr. Smith had asked for the books and records of the agency which under Section 17(1) of Regulation 938 were required to be on the premises. Ms. Mantes could not produce them, of course, because she appeared to know nothing of the agency's business or even the names of the registrants. There did not appear to be a certificate of registration which is required to be prominently displayed under Section 22(6) of the Regulations. On February 16th, 1988, Mr. Smith returned to the business and found a lady in the office preparing income tax returns and who said she knew nothing of the travel business or the registrants. Her presence there with no one able to carry on the business of the agency was a contravention of subsection 4 of Regulation 938. Mr. Smith then departed and on February 28th, 1988, wrote a letter (Exhibit 10) requiring production of the financial records from the agency. None were produced.

A Mr. Raymond Steeds, chartered accountant, employed by the same Company on behalf of the Registrar, made an inspection of the premises on May 5th, 1988, and met a person known as Valerie Yenta in the office who said she was a student and knew nothing of the travel business and spoke very little English. No books or records were available and the agency was again in contravention of the Regulations. Prior to that on March 31st, 1988, a Mr. Carry, a compliance officer with the Ministry, attended at the office to inspect the books which again were not available to him. In the office in the meantime was a man who introduced himself as Mr. Mota and who, with a clerk, was preparing income tax returns. He gave Mr. Carry a business card which carried the name of Victor Mota, Economista, Caldas Travel Agency and which bore the registrant's address. Until that time, Mr. Mota was unknown to the Department.

Eventually a financial officer with the Ministry attended a meeting at which Balaeiro was present with the Registrar and a department official by the name of Malahan. Balaeiro explained that it was a Portuguese custom to carry his father's name and his mother's maiden name which explained his use of the two names Balaeiro and Mota. It must be remembered, however, that the agency was registered under the name of

Balaeiro. He then promised to provide all the records and statements as of the 29th of April for the Ministry's examination, but these, to date, have not been produced.

The Registrar has adduced evidence for the Tribunal of the background of Victor Mota, who has three Judgments against him, being Exhibits 14A, B and C. These Judgments show as Plaintiff, Central Trust Company, 28,345.75 dated August 11th, 1986; The Bank of Nova Scotia, \$28,926.09 dated October 21st, 1983; and Iberic Oil Company Ltd. \$2,751.86 dated September 8th, 1982. These Judgments were not disclosed on the application for Caldas Travel Agency's registration but, of course, the application was made in the name of Balaeiro and not Mota. Mota has, however, admitted that he is one and the same person as Balaeiro. There is no driving record under the name of Victor Balaeiro but under the name of Victor Mota. There is a record with several speeding convictions and again this applied to the same man.

The Registrar of the Travel Industry Act, Hal Burns, in his evidence said that he was concerned not only with the financial stability of the agency and any possible claims against the compensation fund, but also the registrants' failure to disclose the books and records and the Judgments. It appears also from Exhibits 7 and 8 that Balaeiro was registered as a mortgage broker from July 11th, 1984 to July 11th, 1986, and his registration was revoked by the Ministry. It also appears that Victor Mota was registered under the Real Estate and Business Brokers Act as a salesman until the Ministry revoked his registration at the end of April 1987. It appears further that at the same time as Mota was registered as a real estate salesman, he was registered under the name of Balaeiro under the Travel Industry Act which was a contravention of the Real Estate and Business Brokers Act.

We find as a fact that the Registrar has produced sufficient evidence of the registrants' contraventions of the Regulations and that there has been wilful refusal on the part of the registrants to produce the books and records of the agency.

The Tribunal therefore finds overwhelming and unequivocal evidence that the Proposal of the Registrar is not only reasonable but mandatory for the protection of the public and compliance with the Act. The Applicants appear throughout this matter to be acting as if to place themselves above the law. We, therefore, by virtue of the authority vested in it under Section 6(4) of the Travel Industry Act, direct the Registrar to carry out his Proposal.

MR. AND MRS. AHMED

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

P.A. MAHONEY, representing the Applicants

BRIAN M. CAMPBELL and CAROL A. STREET,
representing the Ontario New Home Warranty Program

DATE OF

HEARING: 27 October 1988

Toronto

REASONS FOR RULING

This is an appeal by Mr. and Mrs. Ahmed from a decision of the Ontario New Home Warranty Program dated June 6th, 1988 in which the Program refused to compensate them for what damage was alleged as a result of a structural defect under section 14(1)(a) of the Ontario New Home Warranties Plan Act. We note that the decision of the Program was June 6th, 1988 and that the Applicants' requested a hearing on June 15th, 1988 and on July 8th, 1988 issued a claim in the District Court for damages arising out of the contract between them and the respondent company Silverstar Homes Incorporated.

We have been persuaded by Mr. Mahoney representing the Applicants that the Applicants wished this hearing before the Tribunal to consider their claim because this was an expeditious manner in which it could be dealt with and decided. At the sametime, however, very, very shortly thereafter, they had issued the claim in the District Court.

Now in both of these actions, the parties are virtually the same because it involves the Applicants here and Silverstar Homes, although the Ontario New Home Warranty Program is named in this appeal. The issues we find are virtually the same in the District Court proceedings and in the appeal with the exception of those issues being more comprehensive in the District Court action because the

plaintiffs in that action have sued both in contract and in tort; the action is framed in both negligence and contract.

I direct attention to the Statement of Claim issued on the 8th day of July in which it is pleaded that the plaintiff relies upon the provisions of the Ontario New Home Warranties Plan Act, and in paragraph 9(a) read that the defendant "failed to take proper care" in constructing a particular wall in the southerly basement. That is the wall referred to in the grounds for appeal which in paragraph 1 states that they failed to construct a "structurally sound south foundation wall." In paragraph 9(b) of the Statement of Claim, "it failed to employ proper materials in the construction of such wall." Paragraph (c) "it failed to employ competent and skilled workers in the construction of such wall." And so we find that the attention of the District Court is going to be directed to the same issue as far as that part of the contract is concerned as the attention of this Tribunal.

It is argued that the Tribunal must hold a hearing and that is what it has done today. However, it is not limited in its jurisdiction as to the conclusion of that hearing. Directing my attention to the Statutory Powers Procedure Act, section 21, I quote, "A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held." We have taken the view that in the light of the action in the District Court, it would be premature for this Tribunal to proceed because the claim is fairly comprehensive and all the evidence is not available to us that would be available to the District Court. We take the view also that it is desirable, if not imperative, to avoid multiple proceedings thereby leading, to perhaps, inconsistent decisions by different forums.

The case of Huebner v. Direct Digital Industries Ltd. which is a decision of Mr. Justice Goodman clarifies the law on this point to a degree where he says that, "It is clear from the material and submissions of counsel for the parties that both actions arose out of the transaction for the sale of direct shares from Huebner and Long to Intercontinental" and he goes on to say, "It is common ground that much of the evidence which will be adduced in each action by the parties will be common to both cases. The question then arises which action is to be tried first, which is to be stayed?" He continues at page 376, "It is trite law that a multiplicity of proceedings is to be avoided wherever possible." As a result, he stayed one of the actions.

That decision is consistent with that of Justice Montgomery and the decision of the Divisional Court in Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. heard on March 21st, 1983 by three Justices of the Divisional Court. The Court held, and this was an appeal from Mr. Justice Montgomery's decision to stay an action:

The appeal should be dismissed.
 Montgomery J. was amply justified in granting the stay on the basis that there were overlapping factual issues in the case at Bar and in the other actions that the risk of inconsistent results was to be avoided and that a stay was in the public interest in view of the number of other complex cases involving enormous damage claims.

The Court continues in this case by saying, in Mr. Justice Montgomery's judgment:

...he considered the stay to be justified because otherwise the applicants, who, as I have pointed out, are involved in a host of other actions involving great amounts of money, would be obliged to stand by while the question as to the reasonableness of the need for evacuation was decided in an action in which they were not parties. It is apparent that Mr. Justice Montgomery thought this was unfair to the applicants, and that it might lead to the risk of inconsistent findings of fact in different actions, a result which the Court seeks to avoid.

And continuing in this case, the Court says:

There are a few additional matters on which we wish to state our views. Although it is a generally held view that justice delayed is justice denied, we can see no substantial denial of justice to the parties in this case if the action is stayed. With the present laws respecting prejudice interest, the plaintiff, if successful, will in all probability be compensated for the delay by interest awarded on any judgment which it might recover.

That is our view of this matter; that in the District Court action prejudgment interest if the plaintiff is successful, will no doubt be awarded and certainly will be requested, and would compensate him for any delay as a result of an adjournment.

We appreciate that Mr. Mahoney expected this matter to proceed today and we appreciate the fact that with little or no notice, an adjournment was going to be sought by the Program. Unfortunately, however, the Program was unaware of all the circumstances, as we understand it, until yesterday and under all the circumstances could hardly give Mr. Mahoney the notice which he would have desired. We appreciate that his clients are here and that probably other witnesses are here and that he is ready to proceed. Nevertheless, in view of previous decisions in which I may include a decision of this Tribunal dated the 7th day of May, 1984 - an appeal under the Ontario New Home Warranties Plan Act of Carleton Condominium Corporation No. 111, the Tribunal at that time in that case felt and found that, as a result of Supreme Court proceedings continuing with regard to the same claims, that the Tribunal found it was not in the interest of the parties to adjudicate on those claims leaving them to the Supreme Court. That is the decision of this Tribunal, that the matter should be left to the District Court where the plaintiff has brought his claim.

The matter will therefore be adjourned sine die.

GREELY CUSTOM HOMES LTD.

HEARING TO CONSIDER AN APPLICATION
FOR A STAY BY THE APPLICANT OF THE ORDER OF
OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

APPEARANCES:

N.J. SCHULTZ, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 25 January 1988

Toronto

REASONS FOR RULING

By a Decision and Order released on November 25th, 1987, this Tribunal directed the Registrar of the Ontario New Home Warranty Program to carry out his Proposal to revoke the registration of Greely Custom Homes Ltd. and Hy-Fortune Custom Homes Ltd. "...unless within 30 days" of the issue of this Decision and Order, the full sum claimed by the Warranty Program...shall be paid to it in full, except for the sum of \$7,061.99".

On December 23rd, 1987, this Decision and Order was appealed by Greely to the Supreme Court of Ontario (Divisional Court). The Notice of Appeal contains some nine separate grounds of appeal.

By letter dated the same date, the solicitors for Greely requested a stay of the Tribunal's order pending final disposition of the appeal before the Courts. After the Registrar refused to consent to the stay, the Tribunal convened a hearing to consider the application for a stay. At the conclusion of this hearing, the Tribunal reserved its decision on the matter. This ruling is the result of the Tribunal's deliberations.

Mr. Schultz, counsel for the Applicant and Mr. La Fortune, the director and officer of both Greely and Hy-Fortune, acknowledged that the onus was on the Applicant to satisfy the Tribunal that a stay of its order was appropriate in the circumstances. He pointed to the three principal

criteria which have been applied by the Tribunal in the past, namely, is the appeal bona fide; are the grounds of appeal substantial; and is the balance of interest in favour of the Applicant as opposed to that of the general public? In his submission, the appeal launched by his clients was not frivolous as it raised not only questions of law but also the findings of fact made by the Tribunal. While he admitted that he had taken a "shot gun" approach in preparing the Notice of Appeal, two grounds of appeal - whether Section 13(1) of the Ontario New Home Warranties Plan Act imposed strict liability upon the builder and whether the builder, Greely, was liable to indemnify, totally, the Program, were the heart or nub of the appeal.

Mr. Schultz advised the Tribunal that Mr. LaFortune, who as earlier noted is the principal officer of Greely and of Hy-Fortune, only wished to continue the registration of Hy-Fortune Custom Homes Ltd. To this end, he said Mr. La Fortune would provide to the Ontario New Home Warranty Program, letters of credit to hold as security for the payment of Greely's liability, should the Tribunal's decision be upheld.

Mr. Schultz argued that to deny the stay would cause his clients considerable financial hardship as no current or future company in which Mr. La Fortune had an interest, nor Mr. La Fortune personally could obtain registration under the Ontario New Home Warranties Plan Act. He noted that Mr. La Fortune had the reputation of being a good builder and that the Tribunal had so found. He argued that under these circumstances, with security provided to the Program, the public interest would not be at risk if a stay of the Tribunal order was granted.

Mr. Campbell, counsel for the Registrar, opposed the application on three grounds: firstly, that the Tribunal had no jurisdiction to grant such an order; secondly, if the Tribunal had jurisdiction, the panel was improperly constituted, because, in his submission, the same members of the Tribunal who heard the original appeal must hear the application for the stay; and thirdly, if there is jurisdiction, Mr. Schultz had not discharged the onus placed on his clients as the grounds of appeal as set out in the Notice of Appeal had no merit.

As the Tribunal understands Mr. Campbell's submissions relating to its jurisdiction, it is his position that the Tribunal was functus since the stay had not been applied for prior to the expiration of the 30 day grace period provided in

the original Decision and Order. The Tribunal rejects this submission. The Ontario New Home Warranties Plan Act is clear and specific. Section 9(9) of the Act provides that "...the Tribunal may grant a stay until disposition of the appeal. The Tribunal's jurisdiction on a stay application only crystalizes after an appeal of its decision has been launched.

In support of his second submission, Mr. Campbell cited the decision in Re: Rose 30 O.R. (2d) 162. He argued that by implication, that decision stood for the proposition that the same panel that heard the original appeal should hear the stay application. Specifically, he referred to Mr. Justice Southey's words that "I am very much aware that the Tribunal had a great deal more knowledge about the facts of this case than I do."

It is not suprising that this comment was made as Mr. Justice Southey had no written order of the Tribunal, nor reasons for judgement, nor any transcript of the evidence. In the present instance, this panel has the written Reasons for Decision and Order. But even if it did not, there is nothing in the legislation, either in the Ontario New Home Warranties Plan Act or the Ministry of Consumer and Commercial Relations Act, which requires the same members of the Tribunal to hear both matters or which would prohibit a differently constituted panel of the Tribunal from dealing with a stay application.

The Tribunal has reviewed the cases cited by Mr. Campbell in support of his third submission. They have been helpful in its deliberations.

The Tribunal is satisfied that the appeal is bona fide and that on the face of it, the grounds of appeal are substantial. Whether they have merit is for the High Court to decide.

In previous decisions, the Tribunal has held that unless the general public was clearly at risk, the benefit of an appeal procedure granted by the legislation should not, for all intents and purposes, be negated or frustrated by refusing to grant a stay. The cases cited by Mr. Campbell do not persuade the Tribunal that this is not a reasonable test.

The Decision and Order of the Tribunal only provided for revocation of registration of Greely and Hy-Fortune Custom Homes Ltd. in the event that the monies the Tribunal found owing to the Program were not paid. If the Program is adequately protected by security then the risk to the public

appears small. Therefore, the Tribunal is prepared to grant a stay of its Decision and Order as against Hy-Fortune Custom Homes Ltd. on condition that security, including interest, for the full amount of the Greely liability is provided either in the form of irrevocable letters of credit, bearer bonds or other security which can be realized by the Program should the appeal be dismissed and which would be held by the Program pending final disposition of the appeal. Upon being notified by the parties that such security has been delivered and accepted, the order applied for will issue.

DAN E. KORNITZER

HEARING TO CONSIDER AN APPLICATION FOR A STAY OF A
DECISION AND ORDER OF THE COMMERCIAL REGISTRATION
APPEAL TRIBUNAL PENDING THE DISPOSITION OF THE
APPEAL TO THE SUPREME COURT

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Chairman, Presiding
DAVID APPEL, Vice-Chairman as Member
A. DONALD MANCHESTER, Member

COUNSEL: DAN E. KORNITZER, appearing on his own behalf
JOHN W. BURTON, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 24 May 1988 Toronto

REASONS FOR RULING

On November 12th, 1987, this Tribunal issued Reasons for Decision and Order directing the Registrar, Real Estate and Business Brokers Act, to carry out her Proposal to refuse to register Dan E. Kornitzer as a real estate broker.

On January 8th, 1988, a copy of a Notice of Appeal to the Divisional Court, purporting to appeal the November Decision of this Tribunal was filed with the Tribunal. The appellant in that appeal was Dan Kornitzer Real Estate Ltd.

By letter dated March 1st, 1988, Mr. Kornitzer requested a Stay of the Tribunal's Order until "the hearing of my case by the Divisonal Court to which I have appealed the said decision".

At the commencement of the hearing of the application for a Stay, Mr. Burton, counsel for the Registrar, by way of preliminary objection, raised the following issues:

Firstly, that the application to the Divisional Court was defective and a nullity in that it was brought in the name of Dan Korntizer Real Estate Ltd. and not in the name of Dan Kornitzer in his personal capacity;

Secondly, that Dan Kornitzer, at the time of the original hearing before this Tribunal was an applicant for registration

and not a registrant under the Real Estate and Business Brokers Act, and that, therefore, Section 9(9) of that Act had no application; and

Thirdly, even if the stay was granted, since the Tribunal did not have authority under Section 9(9) to order the Registrar to register Mr. Kornitzer, the stay order would not have the desired effect as far as Mr. Kornitzer was concerned.

In its November Decision, the Tribunal noted that Dan Kornitzer Real Estate Ltd. had been dissolved by Order of the Companies Branch of the Ministry of Consumer and Commercial Relations effective October 11th, 1982. The charter of this Company has not been revived, therefore, there is no such legal entity. Furthermore, the Decision of the Tribunal related to Mr. Kornitzer in his personal capacity. The Tribunal finds that the appeal to the Divisional Court, in its present form, is flawed on the face of it and a nullity insofar as this Tribunal is concerned.

But even if the Notice of Appeal can be amended to correct the error, the Tribunal agrees with Mr. Burton that section 9(9) of the Real Estate and Business Brokers Act has no application in the circumstances of this case.

That subsection reads as follows:

Notwithstanding that a registrant appeals from an order of the Tribunal under section 11 of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

Mr. Kornitzer was an applicant for registration and the refusal of his application by the Registrar was the issue in appeal before this Tribunal. Under the Act, a distinction is drawn between an applicant for registration and a registrant. The relief under section 9(9) is available only to a registrant, that is, only to a person who is registered under the Act. Mr. Kornitzer is not such a person.

In these circumstances, the Tribunal finds that it has no jurisdiction to grant a Stay of its Order under section 9(9) and it therefore denies the application. In view of this finding, it is not necessary to address the third objection raised by Mr. Burton.

PENHALE TRAVEL AGENCY

APPEAL FROM THE DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ARTHUR GARNER, Member

APPEARANCES:

GERALD HEIFETZ, representing the Applicant

MICHAEL D. LIPTON, representing the
Board of Trustees under the Travel Industry Act

DATE OF

HEARING: 28 July 1988

Toronto

REASONS FOR RULING

The Applicant, Penhale Travel Agency Ltd., a registered travel agent, is appealing the decision of the Board of Trustees under the Travel Industry Act, wherein the Board denied the claim of Penhale Travel. The claim was made under section 15(2) of the schedule contained in regulation 938 under the Travel Industry Act, R.R.O. 1980.

The Board of Trustees has raised a preliminary question before the Tribunal in respect to whether the appeal from the Board's decision was filed on time and whether, on the merits, there are prima facie grounds entitling the Applicant to relief. Both parties agreed to present the preliminary question before the Tribunal for decision today and to fix a date for the hearing on the merits at a later date, should the preliminary question be judged in favour of Penhale Travel.

Under Section 10(7) of the Ministry of Consumer and Commercial Relations Act, the Tribunal has the discretion to extend the time for giving notice requiring a hearing by the Tribunal where the Tribunal is satisfied that there are prima facie grounds for granting relief and that there are reasonable grounds for applying for an extension. Counsels for the Applicant and the Board of Trustees both agreed that if the Applicant could establish a prima facie case for granting relief, the Tribunal should extend the time for giving the notice.

Counsel for both parties agreed that the facts of the case, summarized orally by Mr. Lipton, counsel for the Board of Trustees, were as follows:

Mary Flacavento was the principal of a registered travel agency known as Direct Travel. Direct Travel was registered effective January 15, 1982 and terminated December 8, 1986. It was never registered as a wholesaler under the Travel Industry Act (Exhibit 8).

For a number of months prior to the termination of Direct Travel, Flacavento was also employed by the Applicant, Penhale Travel. While employed by Penhale Travel, Flacavento continued to sell travel services to clients on behalf of Direct Travel. She received payment from such clients for services which Direct Travel was to provide.

Unfortunately, Flacavento diverted the money paid by the clients to her own use. At the same time, she fraudulently used her position at Penhale Travel to have Penhale Travel provide the services for which the clients had paid Direct Travel. For example, she used Penhale's ticket stock to issue tickets to clients of Direct Travel and induced Penhale to issue cheques to travel suppliers in payment for the services requested.

As a result of the fraud of Flacavento, Penhale Travel lost over \$50,000.00.

Flacavento was charged with and convicted of fraud and sentenced to two years less a day in prison.

As a result of Flacavento's fraud, all clients of Direct Travel received the services for which they paid.

Penhale Travel made a claim for compensation from the fund under section 15 of the Act. The claim was refused by the Board of Trustees on February 16, 1988. This decision was confirmed in writing by letter dated March 3, 1988 (Exhibit 9).

Counsels for both parties agree that section 15(2) of the Act governs the present case. Mr. Lipton has argued that in order to succeed in its claim, Penhale Travel must satisfy all the conditions set out in section 15(2) of the Act. He argued that Penhale Travel has failed to so do because it did not act with a travel wholesaler, it never passed money of its clients to a travel wholesaler, and, finally, it never arranged alternate travel services. Such alternate services were not required because the clients of Direct Travel obtained the

travel services they had paid for and, therefore, they were never at risk.

Mr. Heifetz, counsel for Penhale Travel, agreed that no money of clients directly passed to a travel wholesaler and no alternate travel services had been arranged. He argued, nevertheless, that section 15(2) should be interpreted liberally. Under a liberal interpretation, one could argue that monies of clients had been transmitted indirectly to the ultimate wholesalers of travel services, the whole as a result of the fraud of Flacavento. As to the requirement of alternate services, the words should not be interpreted literally.

The Tribunal has reviewed the judgments cited and the legislation itself before reaching its decision.

Section 15 of the Act establishes the fund to pay claims of clients of Travel Agents and Travel Wholesalers as well as claims of Travel Agents.

Section 15(2) sets out the conditions which a Travel Agent must satisfy to receive compensation from the fund. The Tribunal believes every one of the conditions listed must be satisfied. These conditions are as follows;

1. The travel agent must deal at arms' length with the travel wholesaler;
2. The travel agent must pass his clients money to a travel wholesaler;
3. The travel agent must have arranged alternate travel services for the client as a result of the travel wholesaler's failure to provide such travel services.

There have been numerous cases dealing with the application of section 15. The purpose of the fund was discussed in the case of Cosmopolitain Travel Bureau Limited (1986 15 C.R.A.T. at page 235).

The purpose of the fund is clear - to reimburse the client/consumer where through no fault of his own, he is denied travel services for which he has paid. The purpose of the fund was not extended or expanded by the inclusion of

subsection 2 of the section or the addition of subsection 3 some time later.

Subsection 2 of Section 15 allows a travel agent to turn to the fund if a travel wholesaler fails to provide the travel services paid for by a client, if the travel agent chooses at his own expense, to make other arrangements on the client's behalf. The travel agent, by taking such action, steps into the shoes of the client, who could otherwise have claimed against the fund, and is therefore able, in turn, to claim on the fund. This is entirely in keeping with the stated purpose of the fund.

In the decision of *Der Travel Service Ltd.* issued in July 1981, the Tribunal ruled that the fund should not and cannot operate as a kind of business insurance to protect firms against ordinary business losses; the fund, rather, was set up for the protection of the consuming public.

The Tribunal then went on to say:

The fund can operate to protect a travel wholesaling firm in a case where it has sustained a loss as a result of some act undertaken deliberately to protect the consumer or consumers who would otherwise have sustained a loss.

The decision in *M and M Travel*, issued January 1982 laid down the same principle.

The decision in *Tour East Holidays (Canada Inc.)* 1986 (15 C.R.A.T. 239) also studied the purpose of the Compensation Fund. It held that the fund had been established only for the benefit of the client and for no other purpose. It went on to state (at page 246), therefore, that subsections 2 and 3 of Section 15, cannot be read in isolation but must be read in conjunction with the clearly stated purpose of the fund. The only way a travel agent or a travel wholesaler can have access to the fund is if he stands in the shoes of the client who would himself have access to the fund.

The case law has clearly held that, even in the case of fraud, the fund will not be obliged to pay compensation to

the travel agent or travel wholesaler, unless the client had a claim against the fund. Thus if the client received the travel services for which he paid, no claim will be permissible against the fund. See the case of Tour East Holidays Canada Inc. 1986 (15 C.R.A.T. 239).

The case law has consistently held that the client must have been at risk for the travel agent to receive restitution from the fund.

The case law has also strictly enforced the conditions set out in section 15 of the Act, including the requirement that the money of the client passed directly from the travel agent to the wholesaler. Thus, in the case of Ontario Motor League Worldwide Travel (London) Ltd. heard in 1979 where the travel agent had used its own funds to pay the travel wholesaler, and not the money collected from the client, it was held that the failure of the travel agent to pass his clients' money to the travel wholesaler of itself constituted a bar to the claim.

That the Tribunal should be strict in its interpretation and application of subsection 15(2) of the schedule is made clear in the case of Onkar Travels 1986 (15 C.R.A.T. 237). The judgement stated at page 238:

The Tribunal's authority extends only to claims which clearly fall within the terms of section 15 of the schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the schedule clearly intended to apply.

While the Tribunal has a great deal of sympathy for the Applicant, Penhale Travel, unfortunately its claim does not satisfy the requirements of section 15(2) of the Act, for the following reasons:

1. Penhale Travel did not deal with a travel wholesaler as envisaged in section 15(2).
2. Penhale Travel never passed money of a client to a travel wholesaler. The clients were dealing with and making payment to Direct Travel. In any case, the monies they deposited were diverted to Flacavento.

3. The clients were never at risk in as much as they received the services for which they paid.

4. Penhale Travel never arranged alternate travel services.

5. No travel services contracted for were refused or withheld by a travel wholesaler.

Accordingly, the Tribunal holds that the Applicant Penhale Travel has not satisfied it that there are prima facie grounds for granting relief. This being the case, the Tribunal refuses to extend the time for giving the notice requiring a hearing under section 16(1) of the schedule to regulation 938 of the Travel Industry Act. The Tribunal rules that there is no entitlement by the Applicant Penhale Travel to a hearing respecting the decision of the Board of Trustees under section 16(1) of the schedule determining that Penhale Travel Agency Limited's claim was not eligible for payment.

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